SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 526

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE JOHN BARTH COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1 [Caption omitted.]

UNITED STATES OF AMERICA, vs. THE JOHN BARTH COMPANY AND UNITED States Fidelity & Guaranty Company	At law

2 [Praecipe for summons omitted in printing.]
[Summons and marshal's return, filed Sept. 23, 1926, omitted in printing.]

3 In United States District Court, Eastern District of Wisconsin

Bill of Complaint

Filed Sept. 22, 1926

Comes now the plaintiff by its attorney, Roy L. Morse, United States Attorney for the Eastern District of Wisconsin, and for its cause of action against the defendants herein respectfully states and alleges:

I

That at all times hereinafter mentioned the United States of America was and is now a corporation sovereign and body politic.

II

That at all times hereinafter mentioned the John Barth Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business at 459–40th Street, Milwaukee, Wisconsin, and within the jurisdiction of this court.

4 III

That at all times hereinafter mentioned the defendant, the United States Fidelity and Guaranty Company, was and now is a corporation organized under and by virtue of the laws of the State of Maryland, with its post office address and principal place of business at Baltimore, Maryland, and has complied with the laws of the State of Wisconsin in regard to a foreign corporation doing business in such State, and is qualified to do and does business in the State of Wisconsin and within the jurisdiction of this court.

IV

That on or about June 25, 1916, the Commissioner of Internal Revenue duly assessed income and profits tax against the John Barth

Company in the sum of $126,182.81 for the year 1918, of which sum the John Barth Company duly paid $74,764.40.

V

That on or about September 15, 1919, and on March 17, 1925, the John Barth Company duly filed claims for the abatement of income and profits taxes assessed against said company for the year 1918 in the sum of $39,501.58.

VI

That on or about September 20,1919, the John Barth Company as principal and the United States Fidelity and Guaranty Company as surety, in consideration of plaintiff refraining from and suspending the collection of the above-mentioned outstanding taxes assessed against the John Barth Company for the year 1918, pending consideration and adjudication of the aforesaid claims for abatement, executed and delivered on September 20, 1919, to plaintiff a bond in the sum of $60,000, whereby the defendants firmly bound themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally, to pay any part of the tax sought to be abated by the aforesaid claims for abatement. Upon notice and demand by the collector of internal revenue of the amount of tax found by the Commissioner of Internal Revenue to be due upon the determination of said claims, together with interest at the rate of 12 per centum per annum from the time such tax would have been due had no such claim been filed. A copy of said bond is attached hereto and made a part hereof as if herein fully written and marked Exhibit "A" for identification.

VII

That thereafter on or about March 25, 1926, the Commissioner of Internal Revenue considered the said claims for abatement and rejected the same on IT Schedule 4902, in the sum of $29,842.32, of which determination the John Barth Company was notified and payment requested under said bond, demanded, respectively, on or about February 27, 1926, and April 5th and April 20, 1926, but the payment of said tax as shown by said determination, together with interest thereon, has not been made, the John Barth Company having wholly neglected, failed, and refused to pay the same or any part thereof, and still so neglects, fails, and refuses to pay.

VIII

That on or about August 10th and August 27, 1926, the United States Fidelity and Guaranty Company was notified of the determination by the Commissioner of Internal Revenue in rejecting the said claims for abatement in the sum of $29,842.32, and that there

was outstanding against the John Barth Company as a result of the rejection of said claims for abatement, income, and profits tax in the sum of $29,842.32 and interest in the sum of $11,538.12, which was due under the aforementioned bond executed by the United States Fidelity and Guaranty Company as surety, and demand was made upon said dates last mentioned upon the defendant, the United States Fidelity and Guaranty Company for the payment of said taxes and interest so determined to be due, but said United States Fidelity and Guaranty Company has failed, neglected, and refused and still fails, neglects, and refuses to pay said tax and interest, or any part thereof. That the said taxes and interest is still due, outstanding, and unpaid.

6

IX

That pursuant to the provisions of the statute in such cases made and provided, interest on said assessment has accrued at the rate of 1 per centum per month from June, 1919.

X

That the Commissioner of Internal Revenue authorizes and sanctions these proceedings.

XI

By reason of the foregoing and pursuant to the terms and conditions of said bond as set forth in Exhibit "A" attached hereto, defendants, and each of them, are indebted to the plaintiff in the sum of $29,842.32, together with interest thereon at the rate of 1 per centum per month from June, 1919.

Wherefore plaintiff demands judgment against the defendants and each of them for the sum of $29,842.32, together with interest thereon at 1 per centum per month from June, 1919, and the costs herein.

(Signed) R. L. Morse,
United States Attorney,
Attorney for Plaintiff.

Exhibit "A" to bill of complaint

(copy)

Income and profits taxes—Bond under sections 214(a)(12) and 234(a)(14) of the revenue act of 1918

Know all men by these presents that John Barth Company, of Milwaukee, Wisconsin, as principal, and United States Fidelity & Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the United States of America in the sum of sixty thousand and no/100 dollars, lawful money of the United States,

7 for the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas, at the time of filing his return of income for the taxable year 1918 the above-bounden principal has filed or is about to file a claim in abatement based on the fact that he has sustained a substantial loss resulting from a material reduction (not due to temporary fluctuation) of the value of his inventory for such taxable year or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year; and

Whereas, section 214(a)(12) and 234(a)(14) of the revenue act of 1918 provide that in the case of such a claim payment of the amount of the tax covered thereby shall not be required until the claim is decided, but that the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the commissioner, conditioned for the payment of any part of such tax found to be due, with interest, and it appears that the amount of this bond is double that of the tax covered by such claim in abatement;

Now, therefore, the condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector duly pay any part of such tax found by the commissioner to be due, with interest at the rate of twelve per cent per annum from the time such tax would have been due had no such claim been filed, and shall otherwise well and truly perform and observe all the provisions of law and the regulations, then this obligation is to be void, but otherwise to remain in full force and virtue.

Witness our hands and seals this 20th day of September, 1919.

(Signed) JOHN BARTH CO.,
By LOUIS SCHNEIDER, *Pres.*
UNITED STATES FIDELITY & GUARANTY CO.,
By R. K. BARTON, *Agt. Atty. in Fact.*

Signed, sealed, and delivered in the presence of—
JULIUS ZIEGLER,
R. C. MUELLER, JR.

8 [over]

STATE OF WISCONSIN,
Milwaukee County, ss:

On this 20th day of September, 1919, before me, a notary public within and for said county and State, personally appeared R. K. Barton to me personally known, who, being by me duly sworn, upon oath did say that he is the agent and attorney in fact of and for the United States Fidelity & Guaranty Company, a corporation of Baltimore, Maryland, created, organized, and existing under and by virtue of the laws of the State of Maryland, that the corporate seal affixed to the foregoing within instrument is the seal of the said company; that the said seal was affixed and the said instrument was executed by authority of its board of directors, and the said R. K.

Barton did acknowledge that he executed the said instrument as the free act and deed of said company.

[Notary public.] (Signed) CLEMENTINE F. DETTLOFF,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Dec. 3, 1922.

In United States District Court

Demurrer

Filed Oct. 7, 1926

Now, come the defendants, by their attorneys, Lines, Spooner & Quarles, and demur to the complaint of the plaintiff herein for the reason that it appears upon the face of the complaint that the action was not commenced within the time limited by law which time is prescribed by sections 205d of the revenue acts of 1918 and 1921, and sections 277a–2, 278d and 278e of the revenue act of 1924, and sections 277a–3, 278d, 278e, and 1106a of the revenue act of 1926.

LINES, SPOONER & QUARLES,
Attorneys for Defendants.

* * * * * * *

9 In United States District Court

Notice of motion to sustain demurrer

Filed Jan. 4, 1927

To ROY L. MORSE,
U. S. District Attorney for the Eastern District of Wisconsin:

Please take notice that the defendants herein will move the court on the 8th day of January, 1927, or as soon thereafter as counsel can be heard, that the demurrer of the defendants to the complaint of the plaintiff be sustained.

Dated December 23, 1926.

LINES, SPOONER & QUARLES,
Attorneys for Defendants.

* * * * * * *

In United States District Court

Judgment

Filed January 5, 1927

Before Hon. FERDINAND A. GEIGER, Judge

This day came the Assistant United States Attorney Mr. L. H. Bancroft and the defendants with their counsel, Messrs. Lines,

Spooner & Quarles, and the demurrer of the defendants to the complaint came on to be heard and was argued and submitted on consideration whereof, it is ordered that said demurrer be and the same hereby is sustained.

The plaintiff elected to stand on its complaint and it is ordered that judgment be entered dismissing the complaint.

Whereupon it is considered and adjudged by the Court that the plaintiff take nothing by its suit, and that the complaint be and the same hereby is dismissed.

By the court.

(Signed) F. C. WESTPHAL, JR.,
Clerk.

[File indorsement omitted.]

* * * * * * *

10 In United States District Court

Petition for writ of error

Filed Mar. 10, 1927

And now comes the United States of America, a body sovereign and corporate, plaintiff herein, and by its attorney, L. H. Bancroft, Assistant United States Attorney for the Eastern District of Wisconsin, and says that on or about the 5th day of January, 1927, this court entered judgment herein in favor of the defendants and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will appear more in detail upon the assignment of errors which is filed with this petition, and further alleges as follows:

First. That on or about the 28th day of September, 1926, your petitioner brought suit in the United States District Court for the Eastern District of Wisconsin upon its bill of complaint wherein it appears and is alleged that at all times hereinafter mentioned the United States of America was and now is a corporation sovereign and body politic.

Second. That at all times hereinafter mentioned, the John Barth Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, having its principal office and place of business at 459-40th Street, Milwaukee, Wisconsin, and within the jurisdiction of this court.

Third. That at all times hereinafter mentioned the defendant, the United States Fidelity & Guaranty Company, was and now is a corporation organized under and by virtue of the laws of the State of Maryland, having its principal office and place of business at Baltimore, Maryland, and that it has complied with the laws of the State of Wisconsin in regard to a foreign corporation doing

business in such State, and is qualified to do and does business in the State of Wisconsin and within the jurisdiction of this court.

Fourth. That on or about June 25, 1919, the Commissioner of Internal Revenue duly assessed income and profits tax against the John Barth Company in the sum of $126,182.81 for the year 1918, of which sum the John Bath Company duly paid $74,764.40.

11 Fifth. That on or about September 15, 1919, and on March 17, 1925, the John Barth Company duly filed claims for the abatement of income and profits taxes assessed against said company for the year 1918 in the sum of $39,501.58.

Sixth. That on or about September 20, 1919, the John Barth Company as principal, and the United States Fidelity & Guaranty Company as surety, in consideration of plaintiff refraining from and suspending the collection of the above mentioned outstanding taxes assessed against the John Barth Company, pending consideration and adjudication of the claims for abatement, executed and delivered on September 20, 1919, to the plaintiff, a bond in the sum of $60,000 whereby the defendants firmly bound themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally, to pay any part of the tax sought to be abated by the aforesaid claims for abatement upon notice and demand by the Collector of Internal Revenue of the amount of the tax found by the Commissioner of Internal Revenue to be due upon the determination of said claims, together with interest at the rate of twelve per cent per annum from the time such tax would have been due had no such claim been filed, a copy of which said bond is attached to the said complaint and made a part thereof and marked "Exhibit A" for identification.

Seventh. That thereafter on or about the 25th day of March, 1926, the Commissioner of Internal Revenue considered the said claims for abatement and rejected the same in the sum of $29,842.32, of which determination the John Barth Company was notified and payment demanded under said bond, and that the John Barth Company wholly neglected, failed, and refused to pay the sum, or any part thereof, and still neglects, fails, and refuses to pay.

Eighth. That on or about August 10th and August 27, 1926, the United States Fidelity & Guaranty Company was notified of the determination by the Commissioner of Internal Revenue in rejecting the said claims for abatement in the sum of $29,842.32, and that there was outstanding against the John Barth Company as a result of the rejection of said claims for abatement, income and profits tax in the sum of $29,842.32 and interest in the sum of $11,538.12, all of which was due under the aforementioned bond executed by the United States Fidelity & Guaranty Company as surety, and demand was made upon said dates, upon the defendant, the United States Fidelity & Guaranty Company, for the payment of said taxes

12 and interest so determined to be due, but that the United States Fidelity & Guaranty Company has failed, neglected,

and refused, and still fails, neglects, and refuses to pay said tax and interest, or any part thereof.

Ninth. That upon the filing of said complaint and the issuing of a pracipe, a summons was issued out of said court and duly served upon each of said defendants, and that on or about the 7th day of October, 1926, both of said defendants appeared by their attorneys, Lines, Spooner & Quarles, and filed a demurrer to said complaint upon the ground that it appeared upon the face of the complaint that the action was not commenced within the time limited by law as prescribed by sections 250d of the revenue acts of 1918 and 1921, and sections 277-a2, 278d, and 278e of the revenue act of 1924, and sections 277a-3, 278d, 278e, and 1106a of the revenue act of 1926.

Tenth. That on or about the 5th day of January, 1927, after due hearing and argument, the said court sustained said demurrer and entered judgment dismissing the plaintiff's complaint upon the merits.

Eleventh. That petitioner, conceiving itself aggrieved by the judgment entered on the 5th day of January, 1927, in the above-entitled proceedings, desires to have such judgment reviewed by the United States Circuit Court of Appeals for the Seventh Circuit on writ of error.

Wherefore, the annexed assignment of errors considered, your petitioner prays that a writ of error may issue and that petitioner may be allowed to bring up for review before the United States Circuit Court of Appeals for the Seventh Circuit the said judgment and decree of the said District Court sustaining the demurrer of the defendants and dismissing the suit of petitioner, and that after due hearing there be judgment reversing the decree of the said District Court and that petitioner may have such other and further relief in the premises as may be just.

L. H. BANCROFT,
Attorney for Petitioner.

[*Duly sworn to by L. H. Bancroft; jurat omitted in printing.*]

13 In United States District Court

Assignment of errors

Filed Mar. 10, 1927

The United States of America, plaintiff in this action, in connection with and as a part of its petition for a writ of error filed herein, makes the following assignment of errors which it avers were committed by the court in the rendition of the judgment against this plaintiff appearing upon the record herein, that is to say,

First. That the court erred in holding and deciding that the petition of the plaintiff did not state facts sufficient to constitute a cause of action against the defendants.

Second. The court erred in sustaining the demurrer of the defendants to the petition of the plaintiff.

Third. The court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of the defendants.

Fourth. The court erred in rendering judgment against this plaintiff, whereas judgment should have been rendered in favor of the plaintiff and against the defendant for the reason that it appears upon the face of plaintiff's petition that this was not a suit for the collection of taxes but an action for breach of a bond given in consideration of suspending the collection of the tax and that the
14 filing of a bond created a new obligation which was not effected by any limitation statute pertaining to the collection of taxes.

Wherefore, the plaintiff prays that the said judgment may be reversed.

UNITED STATES OF AMERICA,
By L. H. BANCROFT,
Assistant United States Attorney for the Eastern District of Wisconsin.

In United States District Court

Order allowing writ of error

Filed Mar. 10, 1927

On this 10th day of March, 1927, the above-named plaintiff, appearing by its attorney, L. H. Bancroft, Assistant United States Attorney for the Eastern District of Wisconsin, and filing herein and presenting to the court its petition praying for the allowance of a writ of error and assignment of errors intended to be urged by the plaintiff, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, to sent to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises:

Now, on consideration thereof, the court does allow the writ of error as prayed in the petition of the plaintiff, without bond of plaintiff, it appearing that the above-entitled cause is one in which the United States is the real party in interest in said cause, and this appear being taken by the direction of the Department of Justice of the United States of America.

L. A. GEIGER, *District Judge.*

15 IN UNITED STATES DISTRICT COURT

Writ of error

Filed March 10, 1927

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the Judge of the District Court of the United States of America, for the Eastern District of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said District Court of the United States of America, for the Eastern District of Wisconsin, before you, between United States of America, plaintiff, and the John Barth Company and United States Fidelity and Guaranty Company, defendants, a manifest error hath happened, to the great damage of the said United States of America as by the complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf. You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same at Chicago, Illinois, on the 5th day of April next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the said Supreme Court of the United States, this 10th day of March, in the year of our Lord one thousand nine hundred and twenty-seven, and of the independence of the United States the 151st.

[SEAL.] F. C. WESTPHAL, JR., *Clerk.*

[File indorsement omitted.]

16 IN UNITED STATES DISTRICT COURT

Precipe for transcript of record

Filed March 10, 1927

To F. C. WESTPHAL, JR., *clerk of said court.*

Please transmit to the Circuit Court of Appeals for the Seventh Circuit the following papers in the above entitled action, to wit:

Complaint
Precipe for summons
Summons
Demurrer

Notice of argument
Judgment sustaining demurrer
Assignment of errors
Petition for writ of error
Order allowing writ of error
Citation
Certificate of clerk.
Dated this 10th day of March, 1927.

(Signed) L. H. BANCROFT.
Asst. U. S. Attorney.

[File indorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

17 [Citation in usual form showing service on Lines, Spooner & Quarles, filed Mar. 14, 1927, omitted in printing.]

18 [Clerk's certificate to foregoing transcript omitted in printing.]

19 [Appearances of counsel omitted in printing.]

20 In United States Circuit Court of Appeals, Seventh Circuit

3885

UNITED STATES OF AMERICA vs. JOHN BARTH COMPANY ET AL.	Error to the District Court of the United States for the Eastern District of Wisconsin

Order Setting Cause

Filed Oct. 4, 1927

It is ordered by the court that this cause be, and the same is hereby, set down for hearing on Wednesday, October 12, 1927.

[Minute entry of argument and submission Oct. 12, 1927, omitted in printing.]

21 In United States Circuit Court of Appeals

[Title omitted.]

Questions certified to U. S. Supreme Court

Nov. 4, 1927

In this proceeding certain questions of law have arisen concerning which this court is in doubt and desires the advice of the Supreme Court.

The relevant facts out of which the legal questions grow are—

On May 15, 1919, the John Barth Company, one of the defendants in error, filed its income and excess profits tax return for the calendar year 1918.

On June 25, 1919, the Commissioner of Internal Revenue assessed the tax in the amount disclosed by the return in the sum of $126,182.81, of which sum said the John Barth Company paid when due $74,764.40.

On September 15, 1919, the taxpayer filed a claim in abatement with respect to the remainder of said tax in the sum of $39,501.58.

On September 20, 1919, a bond executed by the defendants in error, the John Barth Company, as principal, and the United
22 States Fidelity and Guaranty Company, as surety, was filed with the collector of internal revenue at Milwaukee, Wisconsin, said bond being as follows:

Income and profits taxes—
Bond under sections 214(a) (12) and 234(a) (14) of the revenue act of 1918

Know all men by these presents that John Barth Company of Milwaukee, Wisconsin, as principal, and United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the United States of America in the sum of sixty thousand and no 100 dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Whereas, at the time of filing his return of income for the taxable year 1918 the above-bounden principal has filed or is about to file a claim in abatement based on the fact that he has sustained a substantial loss resulting from a material reduction (not due to temporary fluctuation) of the value of his inventory for such taxable year or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year; and

Whereas, section 214(a) (12) and 234(a) (14) of the revenue act of 1918 provide that in the case of such a claim payment of the amount of the tax covered thereby shall not be required until the claim is decided, but that the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the commissioner, conditioned for the payment of any part of such tax found to be due, with interest, and it appears that the amount of this bond is double that of the tax covered by such claim in abatement;

Now, therefore, the condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector duly pay any part of such tax found by the commissioner to be due, with interest at the rate of twelve per cent per annum from the time such tax would have been due had no such claim been filed, and shall otherwise well and truly perform and observe all the pro-
23 visions of law and the regulations, then this obligation is to be void, but otherwise to remain in full force and virtue.

Witness our hands and seals this 20th day of September, 1919.

(Signed) JOHN BARTH CO.,
By LOUIS SCHNEIDER, *Pres.*
UNITED STATES FIDELITY &
GUARANTY CO.,
By R. K. BARTON,
Agt. Atty. in Fact.

Signed, sealed and delivered in the presence of—
JULIUS ZIEGLER,
R. C. MUELLER, Jr.

(Acknowledged in Milwaukee, Wis., Sept. 20, 1919)

On March 25, 1926, the Commissioner of Internal Revenue passed upon said claim in abatement and determined that there was due from the John Barth Company on account of income and profits taxes for the year 1918, the sum of $29,842.32, of which determination by the commissioner the John Barth Company was notified and on or about April 5, 1926, the collector of internal revenue, in writing, gave notice to the John Barth Company of the amount due from it as a result of such determination and made demand of it for the payment thereof, which payment was refused. That thereafter, about August 10, 1926, the collector of internal revenue, in writing, gave notice to the defendant, the United States Fidelity and Guaranty Company, of the determination of the Commissioner of Internal Revenue in respect of said claim in abatement of the amount due from the John Barth Company as a result of such determination, and of the refusal of the John Barth Company to pay same, and demanded said payment of the United States Fidelity & Guaranty Company which payment was refused. After such refusal of payment by both the defendants in error, the United States commenced this action against them on September 22, 1926, the complaint setting out the foregoing facts.

The defendants in error (defendants in the District Court) demurred to the complaint on the ground that the action was not commenced within the time limited by law as prescribed by section
24 250(d) of the revenue acts of 1918 and 1921, respectively, sections 277(a) (2), 278(d), and 278(e) of the revenue act of 1924, and sections 278(a), 278(d), 278(e), and 1106(a) of the revenue act of 1926.

The District Court sustained the demurrer and entered judgment for the defendants. From the ruling the United States prosecutes error.

The following are the questions concerning which this court desires advice:

Question 1. Do the above mentioned sections of the statutes, upon which defendants in error rely, or any of the aforesaid sections, constitute a bar to the action of plaintiff in error?

Question 2. Was the demurrer of defendants in error to the declaration of plaintiff in error properly sustained by the District Court?

The clerk of this court is directed to transmit a certified copy hereof to the Supreme Court.

SAMUEL ALSCHULER,
EVAN A. EVANS,
GEORGE T. PAGE,
Judges of the United States Circuit Court of Appeals for the Seventh Circuit.

NOVEMBER 4, 1927.

25 In United States Circuit Court of Appeals

[Title omitted.]

Order setting cause

March 27, 1928

It is now here ordered that this cause be placed on the calendar for the April session of the October term, 1927, of this Court.

In United States Circuit Court of Appeals

[Title omitted.]

Order setting cause

April 10, 1928

It is ordered by the court that this cause be, and the same is hereby, set down for hearing on Wednesday, April 18, 1928.

[Proofs of service of briefs omitted in printing.]

26 [Appearance of counsel omitted in printing.]

27 In United States Circuit Court of Appeals

[Title omitted.]

Order setting cause

April 17, 1928

On motion of counsel for plaintiff in error, it is now here ordered that this cause be reset for hearing on May 3, 1928.

In United States Circuit Court of Appeals

Order dismissing certificate

Filed April 26, 1928

Supreme Court of the United States

No. 610. October term, 1927

THE UNITED STATES OF AMERICA

vs.

THE JOHN BARTH COMPANY AND UNITED STATES FIDELITY & Guaranty Co.

On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit

This cause came on to be heard on a certificate from the United States Circuit Court of Appeals for the Seventh Circuit and was argued by counsel.

On consolidation whereof it is now here ordered by this court that the said certificate be, and the same is hereby, dismissed.

MARCH 19, 1928.

28 A true copy.

Teste:

[SEAL.] CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of the United States.

[File indorsement omitted.]

In United States Circuit Court of Appeals

Mandate of United States Supreme Court

Filed April 27, 1928

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Seventh Circuit, greeting:

[SEAL.]

Whereas lately in the United States Circuit Court of Appeals for the Seventh Circuit, in a cause between the United States of America, plaintiff in error, and the John Barth Company and United States Fidelity & Guaranty Co., defendants in error, No. 3885, wherein certain questions arose which were certified by the said Circuit Court of Appeals to the Supreme Court of the United States for its opinion, as by the inspection of the certificate of the judges of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas in the present term of October, in the year of our Lord one thousand nine hundred and twenty-seven, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel.

On consideration whereof it is now here ordered by this court that the certificate of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, dismissed.

March 19, 1928

You, therefore, are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said certificate notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of April, in the year of our Lord one thousand nine hundred and twenty-eight.

CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of the United States.

[File indorsement omitted.]

29 [Minute entry of argument and submission, May 3, 1928, omitted in printing.]

30 In United States Circuit Court of Appeals

[Title omitted.]

Opinion filed

June 7, 1928

Before ALSCHULER, EVANS, and PAGE, Circuit Judges.

EVANS, C. J.: Plaintiff brought this action to recover $29,442.42 together with interest thereon at 1% per month from June, 1919. Liability was traced to an agreement executed by defendants whereby they agreed "to pay any part of the tax found by the commissioner to be due plaintiff from John Barth Company as income and profits tax." Defendants demurred to the complaint on the ground that the cause of action was barred by the statute of limitations because more than five years elapsed between the date of the tax return and the determination by the commissioner. The demurrer was sustained and judgment for defendants followed.

The complaint alleges that the John Barth Company, hereinafter called the taxpayer, made its 1918 income tax return to the Government and was assessed thereon a tax aggregating $126,182.81, a part of which the taxpayer promptly paid; that thereafter the taxpayer filed a claim in abatement with respect to the unpaid portion of the tax. It gave a bond pursuant to section (214a U. S.) act of

31 1918 executed by defendant, United States Fidelity and Guaranty Company.

This action is upon the bond.

Recited in the bond are the filing of the taxpayer's income tax return, its subsequent filing of a claim in abatement based upon an

asserted loss, the execution of the bond pursuant to section 214 (a) and 234 (a) of the revenue act of 1918 in order that payment of the tax be deferred until the claim in abatement be decided.

The obligation reads: "Now, therefore, the condition of the foregoing obligation is such that if the principal shall, on notice and demand by the collector, duly pay any part of such tax found by the commissioner to be due, with interest, at the rate of 12% per annum * * * then this obligation is to be void but otherwise to remain in full force and effect."

On March 25th, 1926, the Commissioner of Internal Revenue passed upon the claim in abatement and determined that there was due from the taxpayer for income and profits tax for the year in question, the sum of $29,842.42. Demand for payment was made on the taxpayer and the surety company. Payment was refused. This action was thereupon commenced.

Pertinent sections of the statutes are set forth in the margin.*

32 Plaintiff seeks to distinguish between an action to recover a tax and one based upon a surety agreement wherein the signers agreed to pay a sum represented by the tax. It admits its action to collect the tax as such has been barred by the statute of limitations. Its reliance is therefore solely upon the written obligation of defendants to pay the amount ultimately fixed by the commissioner.

In short, its position is that the taxpayer had the alternative of paying the amount assessed against it or of giving a bond to secure plaintiff while its abatement claim was pending before the commissioner. Having elected to give the bond, an additional cause of action accrued to the Government. Stated differently, the Government, upon its receipt and acceptance of the bond, became possessed of two remedies. It could enforce the collection of the tax in the manner provided by law when the amount thereof was determined, or it could sue upon the bond. Having two separate and distinct causes of action, each was subject to the application of its appropriate statute of limitations.

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* Section 250 (d) of the act of 1918:

"Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

Section 250 (d) of the act of 1921:

"The amount of income, excess-profits, or war-profits taxes due under any return made under this act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this act for prior taxable years or under prior income, excess-profits, or war-profits tax acts, or under section 38 of the act entitled "An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed unless both the commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this act or under prior income, excess-profits, or war-profits tax acts, or of any taxes due under section 38 of such act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this act."

Defendants do not dispute the creation of an additional cause of action which arose upon the execution of the surety agreement. They contend, however, that the statute, sections 250 (d), act of 1918, 250 (d), act of 1919, not only places a time limit on
33 plaintiff's remedy but section 1106 (a), act of 1926, extinguishes the liability itself.

It further insists that the greement (the basis of the second cause of action accruing to the Government) must be the sole measure of liability of those who executed it. In the instant case this agreement was merely to pay a tax, and when the tax was extinguished (not merely barred) all liability thereunder was terminated.

The courts that have passed upon this question are not in accord. Some district courts have held (decisions not reported) that the obligation of the taxpayer and the surety arising out of the execution of the agreement was to pay a sum of money which the commissioner should ultimately find due as a tax. Other courts hold that the obligation, being one to pay a tax, is as fully met by the extinguishment of the tax as by its payment by the taxpayer.

In general, it may be said that statutes of limitation bar only the remedy. But the different statutory enactments on the subject of time limitations upon the determination and assessment of income taxes culminating in the act of 1926 indicate an intent not merely to bar the remedy but to extinguish entirely all liability for the tax, where its determination and assessment is not made within five years after filing the return.

Congress evidently sought to cure, so far as possible, the evil of long delay in determining the amount of the tax with its consequent embarrassment to taxpayers and the huge penalties upon taxes determined after much delay.

Our conclusion respecting this doubtful question is that the liability under the agreement must be strictly measured by its words. Inasmuch as the parties agreed to pay "any part of such tax found by the commissioner to be due," there was no obligation to pay what had been extinguished prior to the commencement of this action.

This distinction may at first seem to be a refined one, but it is predicated upon the rule that the surety is justified in construing his contract strictly.

That the parties might have agreed to pay a sum of money rather than a tax can not be questioned. Likewise they had the option of submitting an agreement where the liability was limited to the payment of a tax. In the agreement under consideration, defendants agreed merely to pay the tax. The tax having been extinguished, the Government can not enlarge by construction of words, or
34 otherwise, the obligation of the parties.

The Government further contends that the filing of the bond was, in and of itself, a waiver or a tolling of the limitation provision of the statute. This contention would be more persuasive

were it not for the provision of the act, section 250 (d), act of 1921, which reads:

"Unless both the commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax," etc.

This express provision covering the tolling of the statute of limitation excludes the possibility of implied waivers. Expresso unius est exclusio alterius.

The judgment is affirmed.

35 In United States Circuit Court of Appeals

3885

UNITED STATES OF AMERICA vs. THE JOHN BARTH COMPANY AND United States Fidelity and Guaranty Company.	Error to the District Court of the United States for the Eastern District of Wisconsin.

Judgment

June 7, 1928

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

In United States Circuit Court of Appeals

Note re petition for rehearing

And afterwards, to wit, on the twenty-sixth day of June, 1928, there was filed in the office of the clerk of this court a petition for a rehearing, which said petition for a rehearing is not copied here.

JUNE 26, 1928. JLM—El.

Inclosure No. 257740 from Department of Justice

Section 1106 (a) of the act of 1926:

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

Section 284 (a) of the act of 1918:

"In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed."

RICHARD S. DOYLE, Esq.,
Southern Building,
Washington, D. C.

SIR: Enclosed herewith is a printed copy of the petition for rehearing which has been filed in the Circuit Court of Appeals for
36 the Seventh Circuit in the case of United States v. The John Barth Company and the United States Fidelity and Guaranty Company. Please acknowledge receipt thereof on the enclosed copy of this letter.

Respectfully,
For the Attorney General,

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

Receipt acknowledged.
RICHARD S. DOYLE,
By B. T. SIMONSON.

[Indorsed: Filed June 29, 1928. Edward M. Holloway, clerk.]

In United States Circuit Court of Appeals

Order extending time

July 6, 1928

On motion of counsel for defendant in error it is now here ordered that the time for filing answer to petition for rehearing in this cause be, and the same is hereby, extended to July 20, 1928.

In United States Circuit Court of Appeals

Note re brief in opposition to petition for rehearing

And afterwards, to wit, on the nineteenth day of July, 1928, there was filed in the office of the clerk of this court a brief in opposition to petition for rehearing, which said brief in opposition to petition for rehearing is not copied here.

37 In United States Circuit Court of Appeals

[Title omitted.]

Opinion on petition for rehearing filed

September 12, 1928

On petition for rehearing:

In support of its petition for rehearing, plaintiff in error calls our attention to section 612 of the internal revenue act of 1928 which

repeals section 1106 (a) of the revenue act of 1906 as of the date of its enactment.

The 1928 act was enacted subsequent to the oral argument and, of course, subsequent to the judgment which fixed the rights of the parties, and it was not considered by counsel or court. The argument is now made by plaintiff in error that this repeal wiped out the taxpayer's only defense. The validity of such legislation is maintained on the ground that it is a purely limitation statute, dealing only with the remedy.

In our opinion, section 1106 (a) of the revenue act of 1926 was something more than a limitation statute. It not only operated to bar the remedy but specifically extinguished the cause of action.

38 Such being the character and effect of this statute, it was not within the power of Congress to enact legislation to recreate the liability thus extinguished. William Danzer & Company, Inc., v. Gulf & Ship Island Railroad Company, 268 U. S. 633; 17 R. C. L. 674.

The petition for rehearing is denied.

39 In United States Circuit Court of Appeals

[Title omitted.]

Order denying rehearing

September 12, 1928

It is ordered by the court that the petition for a rehearing in this cause be, and the same is hereby denied.

40-41 [Clerk's certificate to foregoing transcript omitted in printing.]

42 Supreme Court of the United States

Order allowing certiorari

Filed January 7, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement:] File No. 33,835. U. S. Circuit Court of Appeals Seventh Circuit. Term No. 526. The United States of America, petitioner, vs. The John Barth Company and United States Fidelity and Guaranty Company. Petition for writ of certiorari and exhibit thereto. Filed October 30th, 1928. File No. 33,835.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. ———

UNITED STATES OF AMERICA, PETITIONER

v.

THE JOHN BARTH COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above-entitled cause on the 7th day of June, 1928 (R. 29), affirming the judgment of the District Court for the Eastern District of Wisconsin. A petition for rehearing filed June 29, 1928, in the Circuit Court of Appeals, was entertained and was denied September 12, 1928 (R. 31), so that this petition is filed within the time prescribed by the Act of February 13, 1925, on which jurisdiction rests.

STATEMENT

The question presented in this case is whether an action on a bond given to stay the collection of a tax pending consideration of a claim in abatement is barred after expiration of the period of limitation prescribed by law on suits or proceedings for the collection of taxes.

On June 25, 1919, the Commissioner of Internal Revenue assessed income and profits taxes against the John Barth Company in the sum of $126,182.81, of which the John Barth Company paid $74,764.40. (R. 4.)

On September 15, 1919, and on March 17, 1925, the company filed claims for abatement. (R. 4.)

Section 234 (a) (14) (a) of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1079) provided in connection with such a claim for abatement that—

> • • • In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed.

Pursuant to that statute and on September 20, 1919, the John Barth Company executed and delivered a bond, as principal, with the United States Fidelity & Guaranty Company as surety, conditioned for the payment of any part of such tax found by the Commissioner of Internal Revenue to be due upon determination of the claims in abatement. (R. 4, 6.)

On March 25, 1926, the Commissioner of Internal Revenue passed on the claims in abatement and determined there was due from said John Barth Company for such taxes the sum of $29,842.32 with interest, and notice thereof was given and demand for payment was made, which was refused. (R. 5.) Thereupon, and on September 22, 1926, the United States commenced this action against the principal and the surety on the bond to recover the taxes so determined to be due. (R. 2.)

If no claim for abatement and bond had been filed, and the suit had been one to recover the taxes, it would have been barred by the statute of limitations because commenced more than five years after the date the return was filed, because of the provisions of Section 250 (d) of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1083), Section 250 (d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265), and Sections 277–278 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 299, 300), which provided, generally, that no suit or proceeding for the collection of any taxes should be begun after the expiration of five

years from the filing of the return except in case of fraud.

On the institution of the suit these respondents demurred to the complaint on the ground that the action was not commenced within the time limited by law, and the demurrer was sustained. (R. 8–9.) From that decision the petitioner prosecuted error to the Circuit Court of Appeals for the Seventh Circuit. (R. 10.) The latter court, on November 4, 1927, certified to this Court two questions. (R. 20–22.) This Court declined to answer the questions on the ground that they went to the entire case, and dismissed the certificate, and remanded the case to the Circuit Court of Appeals, which affirmed the District Court. (R. 24, 25, 29.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the statutes limiting the time for the assessment of taxes and for commencing suits or proceedings for their collection applied to an action on a bond given to secure the payment of any part of an assessment of taxes found to be due after determination of a claim for the abatement thereof.

2. In holding that the liability of defendants on the bond was extinguished by Section 1106 (a), Revenue Act of 1926, which provides that the statute of limitations in respect of internal-revenue taxes shall not only bar the remedy but shall also extinguish the liability.

REASONS FOR GRANTING THE WRIT

(1) Substantially the same question as is presented in this case has been certified to this Court by the United States Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Maryland Casualty Company*, No. 399, October Term, 1928, and it is desirable to save the rights of the United States in the present case pending the decision of the case so certified.

(2) While there is as yet no conflict of decision between the United States Circuit Courts of Appeals on this question, there is among the District Courts. The cases in the United States District Courts holding that the statute of limitations with respect to suits to collect taxes applies to suits on bonds given to secure payment of taxes pending the determination of claims in abatement are: *United States* v. *The Maryland Casualty Company* (unreported; District Court for the Northern District of California), *United States* v. *Good Springs Anchor Company and Fidelity & Deposit Company* (unreported; District Court for the Southern District of California). In the following District Court cases the contention of the United States has been sustained: *United States* v. *Onken Bros. Company, Inc.* (23 F. (2d) 367; Wyoming), *McCaughn, Collector*, v. *Philadelphia Barge Company* (27 F. (2d) 628; Eastern District of Pennsylvania), *United States* v. *Philip J. Rennolds* (decided August 13, 1928; District Court for the

Southern District of New York, not officially reported).

(3) There are a large number of similar cases pending.

Under the circumstances it does not seem necessary to submit a supporting brief and none will be filed.

WHEREFORE, it is respectfully submitted that this petition for certiorari should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

OCTOBER, 1928.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 526

UNITED STATES OF AMERICA, PETITIONER

v.

THE JOHN BARTH COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 26) and the opinion of the same court on petition for rehearing (R. 31) are reported in 27 F. (2d) 782.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 7, 1928. (R. 29.) Petition for rehearing was denied September 12, 1928. (R. 31–32.) The jurisdiction of this Court is invoked under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION

The question presented is whether an action on a bond given to stay the collection of a tax pending consideration of a claim for abatement is barred after expiration of the period of limitation prescribed by law on suits for collection of taxes.

STATEMENT

The facts in the case, together with the assignments of error, are set forth in the petition. The relevant portions of the statutes are attached as an appendix.

The petition for certiorari has already been filed. At that time it was believed that substantially the same question as is presented in this case had been certified to this Court by the United States Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Maryland Casualty Company*, No. 399, October Term, 1928, and hence, no supporting brief was filed. However, since the filing of the petition in this case, the United States Circuit Court of Appeals for the Ninth Circuit has determined to ask withdrawal of its certificate in No. 399 because of mistaken reference in it to inapplicable statutes and motion to withdraw the certificate will be submitted December 10th. Since the question is not pending in the *Maryland Casualty Company case*, it now seems necessary, with the permission of the Court, to file this supporting brief.

ARGUMENT

It is submitted that the Circuit Court of Appeals has erred in holding that this action is barred by the statutes of limitations. The question is of manifest importance. It has been before several of the courts and there has been a diversity of opinion. The cases in the United States District Courts holding that the statute of limitations with respect to suits to collect taxes applies to suits on bonds given to secure payment of taxes pending the determination of claims in abatement are:

United States v. *The Maryland Casualty Company* (unreported; District Court for the Northern District of California), *United States* v. *Good Springs Anchor Company and Fidelity & Deposit Company* (unreported; District Court for the Southern District of California).

In the following District Court cases the contention of the United States has been sustained: *United States* v. *Onken Bros. Company, Inc.* (23 F. (2d) 367; Wyoming), *McCaughn, Collector,* v. *Philadelphia Barge Company* (27 F. (2d) 628; Eastern District of Pennsylvania), *United States* v. *Rennolds,* 27 F. (2d) 902; District Court for the Southern District of New York.

This is an action by the United States based upon the breach of a bond executed and delivered by respondents in consideration of the petitioner refraining from and suspending collection of income and profits taxes which had theretofore been assessed

against the John Barth Company for the year 1918, pending consideration of certain claims in abatement.

There was no time limit fixed by law for decision on the claim for abatement. The assessment had already been made and the action of the Commissioner in passing on the claim for abatement is not the making of an assessment.

Respondents demurred to the complaint for the reason that the action was not commenced within the time limited by law as prescribed by Section 250 (d) of the Revenue Acts of 1918, and 1921; Sections 277 (a) (2), 278 (d) and 278 (e) of the Revenue Act of 1924, and Sections 277 (a) (3), 278 (d), 278 (e), and 1106 (a) of the Revenue Act of 1926. (R. 8.) Those are statutes of limitations which provide that no suit or proceeding for the collection of income and profits taxes shall be begun after the expiration of the specified period.

The United States contends that the action is one on contract occasioned by the breach of a bond specifically provided for in the statute; that the making of the bond gave the United States a new cause of action separate and distinct from an action to collect taxes, which it already had; that the statutes set up to bar the action can not be extended by implication to reach a proceeding which is not a suit to collect taxes; and that in any event the benefits of such statute were necessarily waived by the obligors on the bond, since the statute providing for the bond contemplated a postponement of col-

lection which is entirely inconsistent with the application of statutes adopted "in pursuance of a legislative purpose to require more prompt action upon the part of the commissioner and collectors". *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346, 350.

The bond was conditioned for the payment of such tax as the Commissioner found to be due on consideration of the claim for abatement. No suit could be maintained on the bond until the abatement claim was decided, and there was no time limit for that decision.

There is no merit in the contention made in respondents' brief in opposition that "the question involved in this case is of singularly narrow compass." (Br. 3.) There is no substantial difference between the questions arising in this case and those arising in connection with bonds given under other statutes to postpone collection. Such bonds are of common occurrence and prior to the Revenue Act of 1924 the practice had grown up of accepting abatement bonds generally, whether or not specifically provided for by the statute. Congress evidently recognized that decisions upon claims in abatement are of present importance because the Revenue Act of 1928 provides in Section 611 that if a claim in abatement was filed with or without a bond and if the collection of the tax was stayed, then the defense of the statute of limitations is withdrawn in so far as it affects collections actually made after the prescribed period.

In their brief in opposition (p. 2) respondents insist that the distinguishing feature of this case is that the Commissioner of Internal Revenue made no determination of any tax nor found any tax to be due until after the period of limitation provided for in the Revenue Acts had elapsed.

In the state of the pleadings, the allegations of the bill of complaint must be taken to be true. It shows that the Commissioner duly assessed income and profits taxes against The John Barth Company for the year 1918 on June 25, 1919. (R. 4.) That was the same year the return was filed and well within the statutory period upon which respondents rely. It is therefore clear that the foregoing statement in the brief in opposition is incorrect if intended to relate to an assessment before the bond was given. The case can not, therefore, be distinguished from those where bond was given after additional assessment. Furthermore, it is submitted that the instant case can not be distinguished from the contrary decisions enumerated in the petition by any such circumscribing of the issues. The fundamental question in all of these cases is whether or not a suit of this character is one to collect taxes which must be brought within the period prescribed by the statutes of limitations in the various Revenue Acts. The question of whether those statutes are applicable is common to all of the cases and should this Court decide that those statutes are not to be extended to a suit of this character the decision in this case will be controlling.

If this Court should decide that those statutes are applicable to this case and that Section 1106 (a) of the Revenue Act of 1926 has operated to extinguish the liability, there would then arise the question whether the retroactive repeal of Section 1106 (a) by Section 612 of the Revenue Act of 1928 is unconstitutional, as held by the court below. This action by Congress will give rise to many administrative difficulties in the Treasury Department and presents another important question of Federal law which has not been but should be settled by this Court.

The decision of the Circuit Court of Appeals in this case is inconsistent in that it seems to recognize that an additional cause of action was created by the execution of the bond but holds nevertheless that this additional remedy is subject to the same statutory bar as the original cause of action. This is contrary to the doctrine that where there are several causes of action open to a plaintiff the fact that one has become barred will not affect his right to any of the others which are not barred. *Southern Pac. R. R. Co.* v. *United States*, 200 U. S. 341; *United States* v. *Whited & Wheless*, 246 U. S. 552.

In this case it is conceded that the tax was imposed by the Revenue Act of 1918 and the question is whether the claim of the United States has become barred by its statute of limitations. Such a question in the event of ambiguity or uncertainty should be resolved in favor of the United States. *Bowers* v. *New York & Albany Lighterage Com-*

pany, 273 U. S. 346, 349; *United States* v. *St. Paul, M. & M. Ry. Company*, 247 U. S. 310; *In Re McClure Company*, 21 F. (2d) 538, 540. The Circuit Court of Appeals held that the question is doubtful but failed to apply the rule that the United States is not bound by a statute of limitations unless the intention of Congress that it should be bound is clearly manifested. It is therefore submitted that the decision is in conflict with applicable decisions of this Court.

CONCLUSION

The questions in this case are of general importance, and there are a large number of similar cases pending. A determination in this case that the statutes of limitations are not applicable to a suit of this character will be controlling in all of the other cases. Should this Court determine that such statutes are applicable, the question of the constitutionality of Section 612 of the Revenue Act of 1928, which repealed Section 1106 (a) of the Revenue Act of 1926, will be presented.

It is therefore respectfully submitted that this is a case which calls for the exercise of this Court's power of supervision and that the petition for certiorari should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

J. LOUIS MONARCH,
Attorney.

DECEMBER, 1928.

APPENDIX

The applicable sections of the Revenue Act of 1918 (c. 18, 40 Stat. 1057), are as follows:

SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

(14) (a) At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss (whether or not actually realized by sale or other disposition) resulting from any material reduction (not due to temporary fluctuation) of the value of the inventory for such taxable year, or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest.

If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed. If it is shown to the satisfaction of the Commissioner that such substantial loss has been sustained, then in computing the taxes imposed by this title and by Title III the amount of such loss shall be deducted from the net income. (b) If no such claim is filed, but it is shown to the satisfaction of the Commissioner that during the taxable year 1919 the taxpayer has sustained a substantial loss of the character above described then the amount of such loss shall be deducted from the net income for the taxable year 1918 and the taxes imposed by this title and by Title III for such year shall be redetermined accordingly. Any amount found to be due to the taxpayer upon the basis of such redetermination shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

SEC. 250. (d) Except in the case of false or fradulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or

fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

Section 250 (d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265) provides:

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act * * *.

The pertinent provisions of the Revenue Act of 1924 (c. 234, 43 Stat. 253) are:

> SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—
>
> • • • • •
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057 (a) (2).)
>
> SEC. 278. (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C., Title 26, Sec. 1061.)

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C., Title 26, Sec. 1062.)

Section 1106 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 113 (U. S. C. App., Title 26, Sec. 1249 (a)), reads:

SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

The Revenue Act of 1928, c. 852, 45 Stat. 791, 875, contains the following provisions:

SEC. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto,

assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

SEC. 612. Section 1106(a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 526

UNITED STATES OF AMERICA, PETITIONER

v.

THE JOHN BARTH COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court for the Eastern District of Wisconsin rendered no opinion. The opinion of the Circuit Court of Appeals (R. 16) and the opinion of the same court on petition for rehearing (R. 20) are reported in 27 F. (2d) 782.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 7, 1928. (R. 19.) Petition for rehearing was denied September 12, 1928. (R. 21.) Petition for certiorari was filed October 30, 1928. Certiorari was granted January 7, 1929. (R. 21.)

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether an action on a bond given to stay the collection of a tax pending consideration of a claim for abatement is barred after expiration of the period of limitation prescribed by law on suits for collection of taxes.

STATUTES INVOLVED

The relevant portions of the statutes involved are attached as an appendix.

STATEMENT

On May 15, 1919, The John Barth Company filed its income and excess-profits taxes return for the calendar year 1918. (R. 11.) On June 25, 1919, the Commissioner of Internal Revenue assessed income and profits taxes against The John Barth Company for the year 1918 in the sum of $126,182.81, of which sum the company paid $74,764.40. (R. 1-2.)

On or about September 15, 1919, and on March 17, 1925, The John Barth Company duly filed claims for the abatement of such taxes in the sum of $39,501.58. (R. 2.)

On or about September 20, 1919, The John Barth Company as principal and the United States Fidelity and Guaranty Company as surety, in consideration of petitioner refraining from and sus-

pending the collection of the outstanding taxes for the year 1918, pending consideration and adjudication of the claims for abatement, executed and delivered a bond in the sum of $60,000. (R. 2.) The bond was as follows (R. 3–4):

> **Income and profits taxes—Bond under sections 214 (a) (12) and 234 (a) (14) of the revenue act of 1918.**
>
> Know all men by these presents that John Barth Company, of Milwaukee, Wisconsin, as principal, and United States Fidelity & Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the United States of America in the sum of sixty thousand and no/100 dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.
>
> Whereas, at the time of filing his return of income for the taxable year 1918 the above-bounden principal has filed or is about to file a claim in abatement based on the fact that he has sustained a substantial loss resulting from a material reduction (not due to temporary fluctuation) of the value of his inventory for such taxable year or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year; and
>
> Whereas, section 214 (a) (12) and 234 (a) (14) of the revenue act of 1918 provide that

in the case of such a claim payment of the amount of the tax covered thereby shall not be required until the claim is decided, but that the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the commissioner, conditioned for the payment of any part of such tax found to be due, with interest, and it appears that the amount of this bond is double that of the tax covered by such claim in abatement;

Now, therefore, the condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector duly pay any part of such tax found by the commissioner to be due, with interest at the rate of twelve per cent per annum from the time such tax would have been due had no such claim been filed, and shall otherwise well and truly perform and observe all the provisions of law and the regulations, then this obligation is to be void, but otherwise to remain in full force and virtue.

Witness our hands and seals this 20th day of September, 1919.

(Signed) JOHN BARTH CO.,
By LOUIS SCHNEIDER, *Pres.*
UNITED STATES FIDELITY & GUARANTY CO.,
By R. K. BARTON, *Agt. Atty. in Fact.*

Signed, sealed, and delivered in the presence of—

JULIUS ZIEGLER.
R. C. MUELLER, Jr.

On March 25, 1926, the Commissioner of Internal Revenue passed upon the claims in abatement and rejected them in the sum of $29,842.32. (R. 2.) Notice of the rejection was given and demand for payment made upon both principal and surety. Such demand was refused. (R. 2–3.)

Thereafter, on September 22, 1926 (R. 1), the United States commenced this action against the principal and surety on the bond. Respondents demurred on the ground that the action was not commenced within the time limited by law as prescribed in the various Revenue Acts. The demurrer was sustained. (R. 5.)

From that decision petitioner prosecuted error to the Circuit Court of Appeals for the Seventh Circuit. (R. 6.) On November 4, 1927, the Circuit Court of Appeals certified two questions to this Court. (R. 11–14.) This Court dismissed the certificate (R. 14–15), 276 U. S. 606, and remanded the case to the Circuit Court of Appeals (R. 15–16), which affirmed the judgment of the District Court (R. 19). Rehearing was denied. (R. 21.) Petition for a writ of certiorari was granted by this Court. (R. 21.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that the statutes limiting the time for the assessment of taxes and for commencing suits or proceedings for their collection applied to an action on a bond given to secure the payment

of any part of an assessment of taxes found to be due after determination of a claim for the abatement thereof.

2. In holding that the liability of defendants on the bond was extinguished by Section 1106 (a) of the Revenue Act of 1926, which provides that the statute of limitations in respect of internal-revenue taxes shall not only bar the remedy but shall also extinguish the liability.

SUMMARY OF ARGUMENT

This is an action by the United States based upon the breach of a bond given by the taxpayer in consideration of the petitioner refraining from and suspending the collection of taxes which had been assessed and concerning which a claim in abatement had been filed. The United States is not bound by any statute of limitations unless that intention is clearly manifested and statutes of this character are to be strictly construed. The doctrine that where there are two remedies for the protection of a right, one may be barred and the other not, is established by the decisions of this Court.

The statutes relied upon by respondents place a limit only upon the time within which assessment may be made or a suit for the collection of taxes commenced. The assessment had already been made and the Commissioner's decision upon the claim in abatement is not the making of an assessment. This action is not a suit for the collection

of taxes but an action on contract upon the additional cause of action created by the bond. Accordingly the statutes relied upon by the respondents have no application.

The bond was conditioned for the payment of such tax as the Commissioner found to be due on consideration of the claim for abatement. No suit could be maintained on the bond until the abatement claim was decided, and there was no time limit on that decision.

Section 1106 (a) of the Revenue Act of 1926 is similarly without application to this proceeding. It merely extends the effect of the bar of the statutes of limitations and before it can apply it is necessary to point out an applicable statute of limitations. In any event Section 1106 (a) was retrospectively repealed by the Revenue Act of 1928, thereby depriving respondents of the defense of that section unless the repeal was beyond the competency of Congress, which we deny. It is settled that Congress has power to ratify and legalize the collection of an unauthorized tax and there is no substantial difference between the exercise of such power and the creation of a tax liability by a retroactive statute. Especially is this true when it is considered that the identical liability had theretofore existed and that the repeal imposed no unexpected burden which might have been avoided if the taxpayer had pursued a different course.

ARGUMENT

I

THIS IS AN ACTION ON CONTRACT BASED UPON THE BREACH OF A BOND AND IS NOT A SUIT FOR THE COLLECTION OF TAXES WITHIN THE MEANING OF THE REVENUE ACTS

In view of the statements in the brief in opposition with respect to the issue involved in this case, an examination of the pleadings at the outset will clarify any doubt as to the nature of this action.

The bill of complaint alleges that on or about June 25, 1919, the Commissioner of Internal Revenue duly assessed income and profits taxes against The John Barth Company in the sum of $126,182.81 for the year 1918, of which sum The John Barth Company duly paid $74,764.40. (R. 1–2.) On or about September 15, 1919, and on March 17, 1925, claims were filed by The John Barth Company for the abatement of the tax so assessed in the sum of $39,501.58. On or about September 20, 1919, The John Barth Company, as principal, and the United States Fidelity and Guaranty Company, as surety, executed and delivered a bond in the sum of $60,000 in consideration of the petitioner refraining from and suspending the collection of the tax so assessed against The John Barth Company pending consideration of the said claims in abatement. (R. 2.) The bill further recites the rejection of the claims in abatement in the sum of $29,842.32 and the failure, neglect, and refusal of both The John Barth Company and the

United States Fidelity and Guaranty Company to fulfill the obligations of the said bond. (R. 2–3.) These facts must be taken to be true upon respondents' demurrer. Accordingly, this is an action by the United States based upon the breach of the bond.

The demurrer (R. 5) is based upon the plea "that the action was not commenced within the time limited by law which time is prescribed by sections 205d (250 (d)) of the revenue acts of 1918 and 1921, and sections 277a–2, 278d and 278e of the revenue act of 1924, and sections 277a–3, 278d, 278e and 1106a of the revenue act of 1926." Thus the question raised by the demurrer is whether the *action* is barred. Accordingly, it is clear that the statement contained in respondents' brief in opposition (p. 2–3), "The issue before this Court is not, therefore, what statutory period of limitation applies to actions upon such a bond as is here involved, but whether or not there has ever been a breach of the bond when no tax was determined or found to be due prior to the time when all tax liability became extinguished," is without force. Plainly, the only issue raised by the pleadings is whether this action is barred by the statutes of limitations set out in the demurrer.

A contention that the Commissioner's determination of the claim in abatement was barred after five years from the filing of the return finds no support in the statutes relied upon. They provide that an assessment must be made within five years. The

assessment in this case had been made before the bond was executed, well within the statutory period. Passing upon the claim in abatement is not the making of an assessment, and hence the period for the Commissioner's action was not limited by the statutes. The tax was already due when the bond was executed, and since it provided that the obligees should pay interest "from the time such tax would have been due had no such claim been filed" (R. 4), it is clear that the decision upon the claim in abatement related back to that time. The claim in abatement was allowed in the amount of nearly $10,000, and it should be clear that a statute of limitations *against the United States* is of no application to such a finding *in favor of the taxpayer*.

II

THE BAR OF THE STATUTE OF LIMITATIONS AGAINST ONE CAUSE OF ACTION DOES NOT REACH AN INDEPENDENT REMEDY

The sections of the statutes upon which respondents rely are statutes of limitations dealing with suits or proceedings for the collection of taxes. Those statutes do not purport to limit suits which are predicated upon the breach of a bond. The fact that the duty which the principal failed to perform was the payment of a tax does not make the action one for the collection of taxes. Compare *Metropolitan R. R. Co.* v. *District of Columbia*, 132 U. S. 1.

It is elementary that the United States is not bound by any statute of limitations unless that intention is clearly manifested, and it is well settled that statutes of this character are to be strictly construed. Whenever called upon to construe such a statute, this Court has consistently announced that rule. *United States* v. *Nashville, Etc., Ry. Co.*, 118 U. S. 120; *Northern Pac. Ry. Co.* v. *United States*, 227 U. S. 355; *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310; *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346.

The Circuit Court of Appeals held that the question here involved is doubtful, but it failed to apply the rule of the above cases. To that extent, therefore, we submit that the decision below is in conflict with the decisions of this Court.

In conformity with that rule of strict construction the doctrine is laid down that, where there are several remedies open to a plaintiff, the fact that one remedy has become barred will not affect his right to any of the others which are not barred. A demonstration of this doctrine is to be found in those cases holding to the effect that a statute limiting the time for bringing a suit to annul land patents is of no application to an action to recover the value of such lands as damages for deceit practiced by the defendant in procuring the patent. *Southern Pac. R. R. Co.* v. *United States*, 200 U. S. 341; *United States* v. *Whited & Wheless*, 246 U. S. 552. In the latter case the Court said (p. 564):

> This doctrine, that where there are two remedies for the protection of a right one may be barred and the other not, is no novelty in the law. So long ago as 5 Pickering, in *Lamb* v. *Clark*, pp. 193, 198, it was tersely stated as then familiar doctrine that "If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been." And the principle has frequently been recognized by this and other courts. *Lewis* v. *Hawkins*, 23 Wall. 119, 127; *Hardin* v. *Boyd*, 113 U. S. 756, 765; *Kirkman* v. *Philips' Heirs*, 7 Heisk. 222, 224; *Ivey's Administrator* v. *Owens*, 28 Alabama 641, 649; *Ganley* v. *Troy City National Bank*, 98 N. Y. 487, 494.

The same principle, applied in a different connection, is found in the decisions to the effect that money paid by mistake creates a separate cause of action for its recovery. *Wisconsin Central R'd* v. *United States*, 164 U. S. 190; *Grand Trunk Wn. Ry. Co.* v. *United States*, 252 U. S. 112. And a statute limiting the time for the collection of taxes has no application to a proceeding for the collection of money refunded by mistake. *Talcott* v. *United States*, 21 F. (2d) 493. In that case the plaintiff sought to recover Federal estate taxes and the United States filed a counterclaim for like taxes erroneously refunded. The court said (p. 494):

> In respect to limitations, the counterclaim is for money paid by mistake, to which the

> statutory limitations for collection of taxes have no application, to which is no limitation.

The case was affirmed by the Circuit Court of Appeals for the Ninth Circuit. (23 F. (2d) 897.) In the opinion it was held (p. 901):

> It is contended that recovery upon the defendant's counterclaim is barred by the statute of limitations, and reference is made to the Revenue Act of 1926, which provides that all revenue taxes, with certain exceptions, shall be assessed within four years after such taxes become due "and no proceedings in court without assessment for the collection of such taxes shall be begun after the expiration of five years after such taxes become due." But here the counterclaim is not a proceeding for the collection of taxes. It is a demand for the repayment to the government of moneys which had been illegally and by mistake paid by an officer of the United States.

This Court denied certiorari, 277 U. S. 604.

From these decisions we take it as well settled that where plaintiff has two remedies the bar of the statute against one will not affect the other.

As we read it, the opinion of the court below recognizes that an additional cause of action was created by the bond. The Circuit Court of Appeals nevertheless held that this additional remedy is subject to the same statutory bar as the original cause of action. We submit that this is entirely contrary to the well-settled doctrine established by the above cases.

III

THE RIGHT TO RECOVER UPON THE BREACH OF A BOND IS NOT AFFECTED BY THE STATUTES IN THE REVENUE ACTS LIMITING THE TIME WITHIN WHICH A SUIT FOR THE COLLECTION OF TAXES MUST BE BEGUN

The language of the sections relied on in the demurrer is that "no suit or proceeding for the collection of any such taxes shall be begun" after the expiration of the specified period. There is nothing in this language to indicate an intention to do more than bar the right to the recovery of taxes. To extend that language by implication beyond that single purpose would be to disregard the ruling founded upon a "great principle of public policy" laid down in the cases cited, *supra*, that the United States "are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." *United States* v. *Nashville, Etc., Ry. Co.*, 118 U. S. 120, 125.

The singleness of purpose of the statute of limitations is indicated by the situation which called for a bond. The bond was given in pursuance of Section 234 (a) (14) of the Revenue Act of 1918. Upon a contemplation of the advantageous position of the Government at the time of posting the bond, the purpose sought to be accomplished becomes clear. The first purpose of the bond was one of advantage to the taxpayer—the postponement of collection of the tax pending the determination of the claim in abatement.

There being no time limit upon the Commissioner's study of the claim, it became necessary to safeguard the Government meanwhile. It was provided that upon the disallowance of any part of the claim the remainder of the tax due should be paid, with interest from the time the tax would have been due, had no such claim been filed. It was not intended that the Government should lose anything by the delay. It was provided that the bond should be conditioned upon the payment of any part of the tax found to be due. If for any reason the tax was not paid or could not be collected it must have been intended that the Government should have recourse to the bond and thus be restored to its original position. It was clearly the purpose so to protect the Government that when the claim in abatement was eventually decided the certainty of collection would not be impaired by the delay. There being already an enforceable cause of action against the taxpayer, collection could not be further secured unless a new cause of action were provided. Foreseeing that the ultimate collection from the taxpayer might be jeopardized by the delay, a bond was required which would permit the collection to be made from a different source. Thus Congress evinced a purpose of authorizing a stay of immediate collection only if adequate safeguards were provided to maintain the Government's present position.

In harmony with the intent of the statute the bond in the instant case was demanded and given.

The surety was a stranger to the claim for taxes. The tax had been assessed against The John Barth Company on account of net income received by it. When the assessment was made in 1919 the Government acquired the right of collection either by suit or distraint proceedings. This involved the right to collect the full amount of the tax only from The John Barth Company. The bond was given in consideration of the Government staying its hand and refraining from exercising the right of collection. The consideration moving to the Government was an entirely new cause of action, coupled with a new source of collection. By this contract the Government acquired no new right to collect the "tax" as such. Its power in that regard was already complete and ample. The principal and the surety are equally liable on the bond to the Government and the cause of action against each is necessarily identical. When measured by the Government's cause of action against the surety, it is apparent that it is not a right to collect taxes. It is a cause of action in lieu of and in addition to the collection of taxes. In exchange for the waiver of its present right of collection against a solvent debtor and to provide against a contingency, such as bankruptcy, or loss or destruction of the taxpayer's property, which might supervene to prevent collection of the tax, the United States obtained this right of action on contract against the principal and the corporate surety. If it be true that the Government in its new cause of action is now confronted with the same

limited statutory period provided for the collection of taxes, it can only be because such was the intent of Congress. To impute any such intent results in a finding that Congress, after having imposed the tax, bartered away a certainty of collection, granted to the taxpayer a means of postponing collection, and then provided a statutory period which might ultimately operate to defeat the collection. It is submitted that such a result was never contemplated by Congress, much less deliberately intended and specifically authorized.

The statutes relied upon by the respondents place a limit only upon the time within which the United States may commence a proceeding for the collection of taxes. If, as the Government contends, this is not a suit for the collection of taxes, then those statutes necessarily have no application to this case.

The precise question here involved has been before several of the courts and there has been a diversity of opinion. The District Court for the Northern District of California on October 21, 1927, in *United States* v. *American Photo Player Co. and Maryland Casualty Co.* (unreported), and the District Court for the Southern District of California on September 13, 1927, in *United States* v. *Good Springs Anchor Co. and Fidelity & Deposit Co. of Maryland* (unreported), decided that the statute of limitations applicable to suits for taxes was a bar to an action on a bond. No opinion was rendered in either of those cases.

However, in *United States* v. *Onken Bros. Co.*, 23 F. (2d) 367, the District Court for the District of Wyoming held that the action on the bond was not barred by the statute of limitations applicable to suits for taxes. The opinion contains the following (pp. 367–368):

> Under their demurrer, which challenges the petition on the ground that the petition fails to state facts sufficient to constitute a cause of action, the point is raised that the cause of action is barred by the statute of limitations, as fixed by section 250 (d), Revenue Act of 1921 (chapter 136, 42 Stats. 227–265), which provides that no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was filed.
>
> Defendants chiefly rely upon the construction of that statute as laid down in the case of *Bowers* v. *New York & Albany Co.*, 273 U. S. 346, which holds that the statute applies alike to a suit in court or to a proceeding by distraint after the lapse of the five-year period. Were this a suit on the part of the government to collect the tax, or were it a proceeding to enforce collection by distraint, that case would undoubtedly be controlling. This is a suit upon a bond given to the plaintiff for the purpose of suspending further action or proceeding for the collection of the tax until the claim for abatement could be passed upon.
>
> In the opinion of this court the bond is a separate and distinct agreement, represent-

ing voluntary action on the part of the government and the defendant against whom the tax was sought to be collected, which superseded and took the place of their rights and privileges under the revenue law limitation. Under that law the government, after the first assessment of the tax, could have sought collection by court procedure or by distraint. If it did not do so for a period of five years after the return was filed, the defendant was entitled to assert his rights guaranteed him by the statute of limitations. Through the promise and agreement represented by the bond, the rights of the parties under the revenue law were postponed and incorporated in the bond, which straightforwardly on its face insures the payment of the tax which may be subsequently determined in a consideration of the claim for abatement, and without mention of the time when such determination should be made. Under such a situation, the only limitation to apply would be the limitation governing suits upon bonds of this character, which is not the point involved here.

The same question was involved in a case recently before the Circuit Court of Appeals for the Fifth Circuit, *Gray Motor Co.* v. *United States*, 16 F. (2d) 367. That was an action by the United States upon an abatement bond executed by the Motor Company and two individual sureties. The bond was given for the same purpose as the bond in the instant case, and the action was brought upon failure of the Motor Company to pay the amount of the tax found

due after the rejection of the claim in abatement. The Motor Company and the sureties filed answers in which they denied that any tax was due, pleaded the statute of limitations in bar to the action, and set up certain fraudulent acts of the manager of the Motor Company by which the company had lost money, so that in fact no profit was earned for the taxable year in question. The District Court sustained demurrers to that part of the answer setting up the statute of limitations and the fraudulent acts of the manager, and judgment was entered for the United States. Error was assigned to the sustaining of the demurrers, to the exclusion of evidence to sustain the allegations of the answer demurred to, and to the entering of the final judgment. By reason of the facts disclosed in the case the Circuit Court of Appeals did not find it necessary as a matter of law to pass upon the question of the statute of limitations. However, the following language from the opinion discloses that the court entertained no doubt that defenses appropriate to a suit for the collection of taxes were not available in a suit on an abatement bond (p. 368):

> Extended discussion and citation of authority are unnecessary to sustain the ruling of the District Court. The suit was on a bond, the condition of which had been clearly breached. By giving bond the company postponed payment of the amount admitted to be due by the return and secured immunity from distraint of its assets. To contest the amount of tax found to be due by the Com-

missioner in this proceeding would be to permit a collateral attack upon the assessment, something not countenanced by the law. If the company desired to dispute the assessment, the way was open by paying the tax and taking the proper steps to recover it back.

United States v. *Rennolds* (S. D. N. Y.), 27 F. (2d) 902, was a suit on a bond given in order to suspend the collection of income taxes pending the determination of a claim in abatement. The defendant contended that the suit was barred by the statutes of limitations and that the tax was extinguished by Section 1106 (a) of the Revenue Act of 1926. This contention was rejected by the court in the following language (pp. 902–903):

> The liability of the surety must be construed upon the instrument executed by it. The tax was found due, the claim for abatement was denied, and the taxpayer failed to pay what he owed the government. These facts show breach of the condition of the bond. There is no part of such condition necessary to attachment of liability nonexistent. True it is that the statute has since by limitation extinguished the tax, but it is not apparent that this fact should also extinguish the liability upon the bond.
>
> The government was in the act of collecting from its debtor by due process of law a debt legally due and owing. At the request of the debtor it suspended its legal action in consideration of the surety's undertaking to indemnify it. That undertaking

created a new liability, governed by a different statute of limitations. The government had thereafter two remedies—one against the taxpayer, to collect the tax by legal procedure; the other against the taxpayer and the surety upon the bond, given to cause the government to desist action to recover the tax, to collect the penalty provided therein, if the condition should be broken. It saw fit not to pursue the first, relying solely upon the second. The condition having been broken, the surety's liability attaches, irrespective of any effect of the statute of limitations upon the coexistent other right of action.

Had the condition of the bond contained the express provision that failure of the government to collect from the taxpayer within the statutory period would relieve the surety, a different situation would exist. But to read into the bond such provision would be to alter the express covenants of a sealed instrument. Could it be contended that, if C should undertake in writing to A that he (C) would pay A for all merchandise sold on open account to B, and A thereafter should sell B such merchandise, but fail to collect from B within a five-year statutory limitation upon open accounts, he could not recover from C upon the latter's written contract within a ten-year statutory limitation period? The negative answer is obvious. The government here had the right to collect the tax by distraint, and for the surrender of that right it properly insisted, as a price

therefor, upon a general promise to pay such amount as might be found due, either before or after the statutory limitation period had expired.

McCaughn v. *Philadelphia Barge Co.* (E. D. Pa.), 27 F. (2d) 628, involved a suit on a similar bond. The contention that the tax was barred and the liability on the bond extinguished was again rejected, the court saying (p. 629):

> It is agreed that the taxpayer's return for the year 1918 (upon which the additional assessment was made) was filed April 29, 1919. It is also conceded by the Government that if no bond had been given no proceeding for the collection of the additional tax could have been brought after April 29, 1924, by reason of the limitation contained in the Revenue Act of 1918 (40 Stat. 1057). The question here for decision, therefore, is whether, after the expiration of the statutory period allowed for proceedings to collect a tax, a suit can be maintained upon a bond given before the statute had run by the taxpayer and a surety in connection with the filing of a claim for abatement.
>
> The defendant's principal contention is based upon section 1106 (a) of the Revenue Act of 1926, which reads in part as follows: "The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability. * * * " (26 U. S. C. A., Sec. 1249 (a).)

He says that, since this section of the Revenue Act operates wholly to extinguish the liability of the principal debtor, therefore no cause of action can exist against the surety.

It must be admitted that his argument appears at first to have considerable force. But, on further consideration, it becomes apparent that the liability referred to in this section must mean the liability for taxes imposed by the revenue law. This liability is the subject matter of the statute. It does not arise from any voluntary act of the taxpayer but is created by the mere will of the sovereign expressed in legislation. Before the bond was executed it was the only obligation upon the taxpayer and if the taxpayer were not a party to the bond I would agree with the contention of the defendant.

However, as soon as the bond was executed, the taxpayer assumed a second and entirely distinct obligation, and became subject to a new and entirely different kind of liability. There was a surety, but the taxpayer was the party primarily bound. The new liability was voluntary and contractual. It was in form a direct and primary obligation, not to pay a tax, but to pay the sum of $12,635, defeasible only upon payment by the taxpayer of a certain amount, to be fixed by subsequent action of the Commissioner. No limitation was put upon the time within which the Commissioner was required to act in fixing such sum. Inasmuch as the collector had the right to proceed immediately

> for the collection of the tax, it follows that he also had the right to require, as the price of forbearance from such action, a general promise to pay such amount as might be found due at any time, either before or after the expiration of the statutory period. This was unquestionably the intent and understanding of the parties. The taxpayer's promise is under seal, and in addition is based upon ample consideration. If the collector had proceeded by distraint, as he had the right to do, the taxpayer's only course would have been to pay the tax and then to have sued for a recovery of the money. The giving of the bond and the withholding of proceedings relieved him of that necessity.

The same principle was recognized by the Circuit Court of Appeals for the Fourth Circuit in *United States* v. *United States Fidelity & Guaranty Co.*, 221 Fed. 27. That was a suit against the surety on a distiller's bond in which the defense was set up, among others, that the suit was barred by the statute of limitations provided in Section 1047, Revised Statutes. In disposing of that defense the court said (p. 29):

> In the first place, we are of opinion that the action is not barred by any statute of limitations. The defendant cites and apparently relies upon section 1047 of the Revised Statutes, which reads as follows:
>
> "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be

> maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."
>
> But this suit is brought upon the bond of a surety, and not to recover a statutory penalty or forfeiture, and it seems clear to us that the section quoted has no application.

A similar holding with respect to the application of Section 1047, Revised Statutes, is found in the opinion in *Raymond* v. *United States*, Fed. Cas. 11596, which involved a suit on a paymaster's bond. The court said (20 Fed. Cas. 337):

> The last plea is, that the action did not accrue to the plaintiff within five years next before the commencement of the suit. No statute limiting the right of action upon a bond to five years has been referred to. The 4th section of the act of February 28, 1839 (5 Stat. 322), which now forms section 1047 of the Revised Statutes, is relied upon. That section provides, that "no suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," shall be maintained, unless commenced within five years from the time when the penalty or forfeiture accrued. This relates to penalties and forfeitures incurred by infractions of the law, and applies as well to suits as to other forms of prosecution therefor; but a civil action upon a bond grows out of contract, whether it be in favor of the United States or of a private person. A penal sum, named in a bond, is not a pen-

alty, within the statute, and it does not accrue under the laws of the United States but under the contract of the party.

The doctrine governing these cases is that the right of the Government to sue for the breach of the bond is not dependent upon, but exists independently and in addition to, the right to sue for the collection of taxes. Upon a consideration of the cases above cited, it is clear that the statutes limiting the time for commencing a suit to collect taxes can have no application to this proceeding.

We submit that these cases present the better view. The cardinal rule of construction applicable to statutes generally, that effect is to be given to the intent of Congress, is applied with equal force when interpreting statutes of limitations. *United States* v. *Noveck*, 271 U. S. 201; *United States* v. *McElvain*, 272 U. S. 633. The statute of limitations is not such a meritorious defense that either the law or the facts should be strained in aid of it. *Harrington* v. *Anderson*, 23 Colo. App. 415.

The cause of action accrued upon the breach of the condition of the bond. It could not arise until the Commissioner had passed on the claim for abatement and determined the amount due and after refusal on the part of the principal to pay the tax. Having availed itself of the benefits of the contract, The John Barth Company can not now avoid its obligation. By taking advantage of the statute the taxpayer was offered an opportunity to postpone the payment of the tax, and it was obviously

the purpose of the Government in requiring the bond to provide against any contingency that might arise to prevent it from collecting the tax as such. Compare *United States Fidelity & Guaranty Co.* v. *United States*, 220 Fed. 592.

This Court has said in *Bowers* v. *New York & Albany Lighterage Co., supra*, that the statutes of limitations against the United States, provided in the Revenue Acts, were "in pursuance of a legislative purpose to require more prompt action upon the part of the commissioner and collectors" (p. 350). Upon such a view of the matter it is clear that this proceeding, which grows out of a method devised by Congress to protect the United States from the delay occasioned by the taxpayer's claim in abatement, is not barred by statutes which were designed to protect the taxpayer from the delays of the Government.

Furthermore, the principal and surety by the terms of the bond contracted to pay the amount determined to be due, and to make that payment *when* the Commissioner made the determination and gave notice of the amount.

The condition of the bond is—

> if the principal shall on notice and demand by the collector duly pay any part of such tax *found by the commissioner to be due*. (Italics ours.)

There was no time limit fixed by law for decision on the claim for abatement, and passing on such a claim is not the making of an assessment.

We have then a contract to pay the amount ultimately determined to be due, when the determination is made, regardless of statutes of limitations on assessments or suits to collect taxes, the benefits of which were waived by the obligors on the bond.

It is conceded that the tax was imposed by the Revenue Act of 1918, and the question is whether the claim of the United States has become barred by its statute of limitations. Such a question in the event of ambiguity or uncertainty should be resolved in favor of the United States. *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, 349; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310; *In re McClure Co.*, 21 F. (2d) 538, 540.

Furthermore, it will be noted that the taxpayer filed a second claim in abatement on March 17, 1925. (R. 2.) This was more than five years after the filing of the return on May 15, 1919 (R. 11), and is inconsistent with respondents' present contention that the Commissioner was then without power to determine the tax. It is an illuminating exposition of the understanding of the parties to the contract and is in harmony with our contention that no limit as to time was placed upon the Commissioner in deciding the taxpayer's claim in abatement. This second claim in abatement necessarily prolonged the Commissioner's determination of the taxpayer's liability and contributed to the postponement of the Commissioner's decision until March 25, 1926 (R. 2), and the filing of this

action until September 22, 1926 (R. 1). Furthermore, the abatement claims were in the amount of $39,501.58, and they were rejected in the sum of $29,842.32 (R. 2), so that the Commissioner's action on March 25, 1926, which respondents now claim to be unauthorized, has actually reduced the tax to the extent of nearly $10,000. It results that by giving the bond in this case The John Barth Company postponed the payment of its tax and secured a reduction of its liability. By its second claim in abatement it further contributed to the delay, so that this action was not filed until after the enactment of the Revenue Act of 1926.

Respondents contend, and the Circuit Court of Appeals held, that Section 1106 (a) of that Act extinguished all liability of the taxpayer. We submit, however, that Section 1106 (a) is not controlling here, for two reasons. In the first place, we contend that when properly construed that section never had any application to this case. In the second place, the repeal of that section by Section 612 of the Revenue Act of 1928 has eliminated it as a defense. While the Circuit Court of Appeals, upon rehearing, held that the repeal was invalid, we submit that it was within the competency of Congress.

In support of our contention that Section 1106 (a) never had any application to this case, attention is called to its language. It provides:

> The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only

> operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

This can only mean that in any suit for the collection of taxes, if it shall appear that the tax has been collected after the statute of limitations has run, then the plaintiff taxpayer may be given relief, even though he could not, as plaintiff, plead the statute of limitations, which has been described as a shield and not a sword. That this is the true purpose of the section is clearly apparent from the legislative history, which shows that the language was added as an amendment to the section after the decision of the Court of Claims in the case of *Toraway Mills* v. *United States*, 61 Ct. Cls. 363. (Cong. Rec., Vol. 67, Part 4, pp. 3531, 4401, 4409, 4410, 4419.)

In *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, 350, this Court said of a limitation provision:

> The provision is to be applied in harmony with the intention reasonably to be inferred from its terms and the circumstances of its enactment.

It is clear from the circumstances of its enactment that the intention reasonably to be inferred from its terms does not permit the application of Section 1106 (a) of the Revenue Act of 1926 to the instant case.

The statement made upon the presentation of the amendment in the Senate is as follows:

> Mr. REED of Pennsylvania. These are offered as committee amendments.
>
> The VICE PRESIDENT. The clerk will read the amendment.
>
> The CHIEF CLERK. On page 289, after line 18, insert:
>
> "SEC. 1106. (a) The bar of the statute of limitations against the United States and against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability."
>
> Mr. REED of Pennsylvania. Mr. President, just a word in explanation of this amendment. The necessity for it arises from a very peculiar case. In a recent decision in the Court of Claims it has been held, in substance, that after the statute of limitations has run against the collection of a tax, the collector may nevertheless issue his distraint and collect the tax by a distraint, and then if the taxpayer brings suit against the United States to recover it back, he, being the plaintiff, can not plead the statute of limitations, although the United States would have been barred from a suit for the tax because the statute had run. It is a preposterous result,

> it seems to me, and a very great hardship to the taxpayer, to allow such a condition to continue, and while I feel reasonably confident, with all respect to the Court of Claims, that that case will be reversed on appeal, I do not think we ought to allow even a possibility that it will not remain, and we ought to correct it now.

The explanation of the amendment in the statement of the House Conferees (Congressional Document No. 8531, House Report No. 356, p. 55) is as follows:

> Amendment No. 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *U. S.*), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court (see Taft, C. J., in *Graham* v. *du Pont*, 262 U. S. 234, 256, 258). The House recedes with an amendment making certain that the provision does not require a refund to a taxpayer for any year (even though the statute has run against the Government) unless he had in fact overpaid his tax for that year, nor require a taxpayer to pay an additional tax for any year (even though the statute has run against his claim or suit for refund) unless he had in fact underpaid his tax for that year. Ob-

viously, this section does not apply in the case of fraud or in the case of a waiver.

The value of congressional debates to establsh the purpose of legislation was recognized by this Court in *Work* v. *Braffet*, 276 U. S. 560, 566.

We submit that the operation of Section 1106 (a) depends entirely upon the application of some other statute of limitations. Unless there is a case involved where the statute of limitations operates as a bar, Section 1106 (a) does not apply. It follows the bar of the statute and does not operate independently. It is of no wider scope than the statute of limitations and must stand or fall with it. The section does not provide that after five years from the date of the filing of an income-tax return relating to the year 1918 the tax is automatically wiped out. On the contrary, it provides that "the bar of the statute of limitations against the United States • • • shall extinguish the liability." That language merely extends the effect of the bar of the statute of limitations, but the section does not cover a field where no statute of limitations is applicable. It is our contention that no statute of limitations is made applicable to a suit by the United States in contract to recover upon the breach of a bond. If that is true, then it is evident that Section 1106 (a) is without application here.

We are urging that the application of a statute limiting the time within which the United States is required to act to a situation where the United States is under obligation not to act is so incon-

sistent that it must be deemed to have been the purpose of Congress that the statute should be suspended while the hand of the United States was stayed. The inconsistency was so obvious that Congress finally wrote into the statutes a declaration that under such circumstances the running of the statute of limitations shall be considered to be suspended. Section 283 (l) of the Revenue Act of 1926 provides:

> In the case of any income, war-profits, or excess-profits tax imposed by prior Act of Congress, in computing the period of limitations provided in section 277 or 278 of this Act on the making of assessments and the beginning of distraint or a proceeding in court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of suspension provided for in subdivision (b) of section 277) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in court.

The purpose of the provision is shown by the following excerpt from the Conference Report on the Revenue Bill of 1926 (Congressional Document No. 8531, House Report 356, p. 48):

> (6) *Suspension of statute of limitations before passage of new bill.*—Section 277 (b) of the bill as agreed to in conference provides for the suspension of the running of the statute of limitations on assessments and col-

> lections during the time when the hands of the commissioner are tied, not only in the cases of taxes imposed by this title, but also (by reason of the provisions of section 283) in the cases of taxes under prior acts, whether a deficiency letter under the 1924 act has been sent out or not. Subdivision (l) of section 283, added by the Senate amendment, provides that in addition to the period of suspension already provided for, the running of the statute shall be considered to have been suspended for any period prior to the enactment of this act during which the commissioner's hands were tied.
>
> The House recedes with an amendment making a clerical change and making a minor clarifying amendment.

There may be some question whether or not Section 283 (l) applies to this case, but it is at least declaratory of the broad purpose of Congress that when a taxpayer is afforded a means of delaying the collection of taxes he must, when availing himself of the privilege, waive the statute of limitations against the United States. Unless the taxpayer in this case understood that the statute of limitations did not apply to the Commissioner's decision upon the claim in abatement, there is no explanation for the filing of a second claim in abatement on March 17, 1925, after the expiration of five years from the date of the filing of the return.

A further inconsistency would result if, after the express declaration in Section 283 (l) that the statute of limitations was suspended during the

period while the Commissioner's hand was stayed, it should be held that Section 1106 (a) of the same statute must be interpreted to extinguish the liability and prevent the collecion of the tax *qua* tax, as well as the recovery of the United States upon the bond.

The Congressional purpose is further demonstrated by a consideration of Sections 607 and 611 of the Revenue Act of 1928. Section 607 provides for the recovery of taxes assessed or paid after the expiration of the appropriate period of limitations. However, Section 611 provides that if a claim in abatement was filed with or without a bond and the collection stayed, then the defense of the statute of limitations is withdrawn in so far as it affects collections actually made after the prescribed period. We think this is a confirmation of our contention that Congress never intended to apply the statute of limitations in cases where the taxpayer contributed to the delay in collection by filing a claim in abatement. It thus appears that if the tax in the present case had been paid in response to the demand of the Collector after the rejection of the claim in abatement, no credit or refund could be made to the taxpayer. This is entirely consistent with our contention that in this case where the tax has not been paid the defense of the statute of limitations is likewise unavailable to a taxpayer who has contributed to the delay by the filing of a claim in abatement. We submit that Section 234 (a) (14) of the Revenue Act of 1918 providing for this

bond created a situation so inconsistent with the statute of limitations that it was the evident purpose of Congress that the claim in abatement and the posting of the bond should virtually amount to a waiver of the benefits of such statutes. We think the provisions of the Revenue Act of 1928, just discussed, demonstrate that to be true. In withdrawing the defense of the statute of limitations in the case of the taxpayer who has actually paid his tax Congress was endeavoring to be consistent and avoid discrimination between those taxpayers who had contributed to the delay but not paid taxes. Since those who had not paid were liable to a suit upon the bond without any limitation as to time, it was appropriate that the defense of the statute of limitations should be withdrawn in those cases where the tax was paid and an attempt subsequently made to recover it. The later legislation is declaratory of the true construction and meaning of the earlier Acts. *Bailey* v. *Clark*, 21 Wall. 284, 288.

Considering the intent of Congress and its purpose to postpone immediate collection of the tax only when the United States was protected by a contract giving rise to an additional cause of action with a new source of collection, the conclusion is inevitable that this suit is an action in contract, based upon the breach of the bond given to insure the United States from all contingencies which might prevent the collection of the taxes directly, and that it can not be barred by a statute limiting the time for a different kind of action.

But whatever effect might otherwise have been given to Section 1106 (a), it is submitted that it can have no present application, for the reason that it was repealed as of the date of its enactment by Section 612 of the Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 791, 875), which reads:

> *Repeal of Section 1106 (a) of 1926 Act.*—Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

The evident purpose and object of that statute was to restore conditions to the exact status which they would have occupied had Section 1106 (a) of the 1926 Act never been enacted. It therefore appears that the plain language of the Revenue Act of 1928 deprives respondents of the defense of Section 1106 (a) of the 1926 Act, and hence the decision of the court below rested upon a statute which had already been repealed. "Of course it does not matter that these cases had gone to a higher Court. When the root is cut the branches fall." *Smallwood* v. *Gallardo*, 275 U. S. 56, 62. See also *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, 232.

On petition for rehearing the Circuit Court of Appeals held that it was not within the power of Congress to enact legislation to recreate the liability extinguished by Section 1106 (a). Heretofore in this brief we have contended that Section 1106 (a) had no application to this case because the statutes of limitations upon which it depended did not bar this action. But, assuming the con-

trary to be true, it is submitted that the repeal of Section 1106 (a) was within the competency of Congress.

In denying that power to Congress the Circuit Court of Appeals relied upon the decision of this Court in *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633. That case dealt not with taxes, but with a statute limiting the time for filing claims for damages against a railroad.

The decision turned upon the principle that the provision limiting the time within which suits must be brought constituted a part of the definition of the cause of action, and that time having elapsed a later statute could not be construed retroactively to create liability. We submit that the instant case is grounded upon very different principles, for the need of the Government for revenue has frequently been decreed a sufficient justification for making a tax measure retroactive. *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 332; *Seattle* v. *Kelleher*, 195 U. S. 351, 359; *Wagner* v. *Baltimore*, 239 U. S. 207, 216; *Billings* v. *United States*, 232 U. S. 261, 282; *Florida Central, Etc., R'd Co.* v. *Reynolds*, 183 U. S. 471.

It was pressed upon this Court in *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, that there was a distinction between a curative statute and a creative statute. Upon that point it was said (pp. 11–12):

> * * * The argument in support of the distinction is ingenious and attractive, but we are not disposed to review it in detail.
>
> The general and established proposition is that, what the legislature could have authorized, it can ratify if it can authorize at the time of ratification. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Wagner* v. *Baltimore*, 239 U. S. 207; *Stockdale* v. *Insurance Companies*, 20 Wall. 323. And the power is necessary, that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration.

It being settled that Congress has the power to ratify and legalize the collection of an unauthorized tax, we submit that there is no substantial difference between the exercise of such a power and the creation of a tax liability by a retroactive statute. Particularly is this true when it is considered that in the instant case the identical liability had theretofore existed and that the repeal of Section 1106 (a) imposed no "unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways." *Lewellyn* v. *Frick*, 268 U. S. 238, 252.

Furthermore, the rule that private rights, which have been vested, can not be taken away by subsequent legislation does not apply when public rights are involved. That is clear from the decision of this Court in *Hodges* v. *Snyder*, 261 U. S. 600, 603–604:

It is true that, as they contend, the private rights of parties which have been vested by the judgment of a court can not be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 429; *The Clinton Bridge*, 10 Wall. 454, 463; *United States* v. *Klein*, 13 Wall. 128, 146; *McCullough* v. *Virginia*, 172 U. S. 102, 124 (in which the repealing act was passed after judgment by the trial court).

This rule, however, as held in the *Wheeling Bridge Case*, does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away. *Pennsylvania* v. *Wheeling Bridge Co.*, *supra.*, pp. 431, 439. This case has been cited with approval in *The Clinton Bridge*, *supra*, p. 463 (likewise involving a public, as distinguished from a private, right of action), *United States* v. *Klein*, *supra*, p. 146; *Stockdale* v. *Insurance Companies*, *supra*, p. 332; and *Mills* v. *Green*, *supra*, p. 655. And so a judgment for the restitution of taxes collected under the ostensible authority of a general statute will be reversed when, after the rendition of such judgment, a statute has been passed legaliz-

> ing and ratifying such taxation. *Rafferty* v. *Smith, Bell & Co., supra*, p. 232.

In the light of those cases it can not be said that no right exists to retroactively create a tax liability. *A fortiori* it can not be said that no right exists to repeal retroactively a statute which extinguishes a liability for taxes, and we accordingly submit that the *Danzer case* is not controlling.

Assuming that Section 1106 (a) ever applied to this case, the ultimate question is whether it conferred any vested right. The principles of taxation are not those of contract, *Seattle* v. *Kelleher, supra*, p. 359. We submit that no man has a vested right not to pay a tax which he really owes (*In re McClure Co.*, 21 F. (2d) 538, 540), and therefore that Section 1106 (a) conferred no vested right. This is analogous to the principle announced by this Court in *Smallwood* v. *Gallardo, supra* (p. 61):

> * * * There is no vested right to an injunction against collecting illegal taxes and bringing these bills did not create one.

In that case suits were brought in the District Court of the United States for Porto Rico to restrain the collection of taxes imposed by the laws of Porto Rico. At that time there was no prohibition against such suits, but a later Act of Congress having provided that no such suit should be maintained, this Court ordered that the cases be sent back with directions to dismiss for want of jurisdiction.

It is submitted, further, that the decision of this Court in *United States* v. *Heinszen & Co.*, 206 U. S. 370, is apposite. That was a suit to recover the amount of tariff duties exacted in the Philippine Islands on merchandise brought from the United States, the duties having been collected under the authority of the President after ratification of the treaty but before the time when Congress had enacted tariff duties for the Philippine Islands. It appeared that a later Act of Congress had legalized and ratified the duties, but it was urged that the ratifying statute was invalid in that it deprived claimants of a vested right of property in the money paid to discharge the illegally enacted duties. With respect to that contention, this Court said (pp. 386–387):

> But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties was in a sense a vested right, it in principle, as we have already observed, would be but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes retroactively operating on certain classes of rights, it is said (Vol. 2, pp. 415, 416):
>
> "The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. *Goshen* v. *Stonington*, 4 Connecticut, 209; *Wilkinson* v. *Leland*, 2 Peters, 627; *Langdon* v. *Strong*, 2 Vermont, 234; *Watson*

> *v. Mercer*, 8 Peters, 88; 3 Story's Comm. on the Constitution, 267."
>
> Nor does the mere fact that at the time the ratifying statute was enacted this action was pending for the recovery of the sums paid cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. Hence again if it be conceded that the capacity to prosecute the pending suit to judgment was in a sense a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. To arrogate to themselves the authority to divest the right of the United States to ratify is then in reason the assumption upon which the asserted right of the claimants to recover must rest.

This is a question of constitutional power, but no just mind need shrink from giving full effect to the statute on the ground that it is repugnant to the spirit of our institutions or the principles of natural justice. The tax was justly due from The John Barth Company, and to the extent it is not satisfied the burden is shifted to others. Therefore, if it be determined that respondents acquired any right from Section 1106 (a) of the Revenue Act of 1926, we submit that the right must be deemed to have been vested subject to the equities existing against it which the 1928 Act recognized and enforced. The presumption repeatedly indulged in favor of the validity of an Act of Congress is particularly strong when considering a Revenue Act. *Nicol* v. *Ames*, 173 U. S. 509.

APPENDIX

The applicable sections of the Revenue Act of 1918 (c. 18, 40 Stat. 1057) are as follows:

SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

(14) (a) At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss (whether or not actually realized by sale or other disposition) resulting from any material reduction (not due to temporary fluctuation) of the value of the inventory for such taxable year, or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice

and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed. If it is shown to the satisfaction of the Commissioner that such substantial loss has been sustained, then in computing the taxes imposed by this title and by Title III the amount of such loss shall be deducted from the net income. (b) If no such claim is filed, but it is shown to the satisfaction of the Commissioner that during the taxable year 1919 the taxpayer has sustained a substantial loss of the character above described then the amount of such loss shall be deducted from the net income for the taxable year 1918 and the taxes imposed by this title and by Title III for such year shall be redetermined accordingly. Any amount found to be due to the taxpayer upon the basis of such redetermination shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due

may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

Section 250 (d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265) provides:

> The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act * * *.

The pertinent provisions of the Revenue Act of 1924 (c. 234, 43 Stat. 253) are:

> SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—
>
> * * * * *
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057 (a) (2).)
>
> SEC. 278. (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C., Title 26, Sec. 1061.)

> (e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C., Title 26, Sec. 1062.)

Section 1106 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 113 (U. S. C. App., Title 26, Sec. 1249 (a)), reads:

> The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

The Revenue Act of 1928, c. 852, 45 Stat. 791, 875, contains the following provisions:

> SEC. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim

in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

SEC. 612. Section 1106(a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

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In the Supreme Court of the United States

OCTOBER TERM, 1928.

UNITED STATES OF AMERICA, PETITIONER,

vs.

THE JOHN BARTH COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESTATEMENT OF THE CASE

The statement on page 2 of petitioner's brief as to the issue involved in this case is as follows:

> "The question presented in this case is whether an action on a bond given to stay the collection of a tax pending consideration of a claim in abatement is barred after expiration of the period of limitation prescribed by law on suits or proceedings for the collection of taxes."

It is respectfully submitted that this statement of the issue is incorrect and misleading and that a proper statement of the issue would be as follows:

> May an action on a bond given under Section 234 (a), 14 (a) of the Revenue Act of 1918, 'conditioned for the payment of any part of *such tax* found by the Commissioner to be due' be maintained when the Commissioner made no determination and found no tax to be due until after the run-

ning of the statutory period of limitation of the Revenue Acts? (Italics ours)

The issue may also be fairly stated as follows:

> Can the Commissioner of Internal Revenue in a case in which a bond has been given conditioned for the payment of any tax found by him to be due make a valid tax determination and thereby create a cause of action on the bond after the statutory period of limitation has expired, *especially* in view of Section 1106 (a) of the Revenue Act of 1926, which provides that the running of the statute of limitations shall not only bar the remedies for the collection of the tax, but will extinguish all tax liability?

The material portions of the Revenue Acts are set forth in the appendix to the brief.

The distinguishing feature of this case, which must not be lost sight of, is that the Commissioner of Internal Revenue made no determination of any tax nor found any tax to be due until after the period of limitation provided for in the Revenue Acts had elapsed. The Circuit Court of Appeals for the Seventh Circuit held, and we submit properly, that the statute of limitations was not suspended by the filing of the bond and that after the statutory period had elapsed, all tax liability was extinguished as much so as if it had in fact been paid. Consequently a subsequent determination of a tax by the Commissioner of Internal Revenue could not revive any tax liability; hence the obligation of the bond to pay a tax never attached and there has therefore never been a breach of the condition of the bond. The issue before this Court is not, therefore, what statutory period of limitation applies to actions upon such a bond as is here involved, but whether or not there has ever been a

breach of the bond when no tax was determined or found to be due prior to the time when all tax liability became extinguished.

The Government in its petition for a writ of certiorari admits on page 3 thereof that if no claim for abatement had been filed and the suit had been one to recover taxes, it would have been barred by the statute of limitations. It appears from the record in this case and the petition of the Government that the determination of the Commissioner of Internal Revenue relied upon as the basis for this action was made after the statutory period of limitation had elapsed, to-wit, on March 25, 1926. It is respectfully submitted, therefore, that the restatement of the issue here involved is necessary to the proper consideration as to whether or not the writ of certiorari should be granted.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

THE PETITION FOR WRIT OF CERTIORARI IN THIS CASE SHOULD BE DENIED FOR THE REASON THAT IT DOES NOT COME WITHIN ANY OF THE PROVISIONS OF RULE 38 (5) b OF THIS COURT.

(a) *In this case the Circuit Court of Appeals for the Seventh Circuit has not "decided an important question of Federal law which has not been, but should be, settled by this Court."*

The question involved in this case is of singularly narrow compass. The bond upon which the action was brought was given, as stated in the bond, pursuant to Section 234 (a), 14 (a) of the Revenue Act of 1918. This section of the Revenue Act of 1918 existed as the law of the United States only from February 14, 1919

to November 3, 1921, and by its terms applied only to taxable incomes received for the year 1918 or the corresponding fiscal year. The purpose of this provision was to permit sales and other information obtained in the year 1919 to be used in re-adjusting the value of 1918 inventories which suffered unusual fluctuations in value because of the termination of the World War and the change from war to peace time conditions in industry.

No provision similar to Section 234 (a), 14 (a) of the Revenue Act of 1918 has been incorporated in any subsequent statute. In order to take advantage of this unique provision a bond given pursuant to that section would have to be filed before payment of the tax disclosed by the 1918 return, that is, before payment of the last quarterly installment. A claim for abatement filed under Section 234 (a) (14) (a) and a bond given in conjunction therewith, are clearly intended to be part of the original return of the taxpayer and subject to all of the administrative rules and regulations and the limitation provisions for the determination of taxes shown on an original return. Such bonds are clearly different from bonds given to stay the collection of additional assessments made by the Commissioner for taxes claimed by him to be due in excess of those shown by the original return. In not one of the cases cited by the petitioner is such a bond in issue. Moreover, respondent is not aware of any similar case pending, nor has petitioner pointed out or even suggested that any other case is pending involving such a bond, as we have here, given under the terms of this unique statute. It is respectfully submitted, therefore, that a decision in an action brought upon a bond given pursuant to Section 234 (a), 14 (a) of the Revenue Act of 1918 would not be

final on the question of actions on abatement bonds in general because of the narrow scope and peculiar conditions giving rise to that unique provision of the Revenue Act of 1918 and bonds given pursuant thereto.

(b) *In this case the Circuit Court of Appeals for the Seventh Circuit has not rendered a decision in direct conflict with decisions of the Circuit Courts of Appeals or of the District Courts of the United States.*

In the petition of the Government on page 5 thereof it is admitted that there is as yet no conflict of decision between the United States Circuit Courts of Appeals on the question here involved. However, the Government cites the following cases in the District Courts which it contends are in conflict with the decision in this case:

United States vs. Onken Bros. Company, Inc., 23 Fed. (2d), (Wyo.) 367;

McCaughn vs. Philadelphia Barge Co., 27 Fed. (2d), (E. D. of Pa.), 628;

United States vs. Rennolds, 27 Fed. (2d), (S. D. of N. Y.), 902.

In the case of *United States vs. Onken Bros. Company, Inc.*, 23 Fed. (2d), (Wyo.) 367, it appears that a claim for abatement and a bond were filed with respect to an *additional assessment* of income tax for the year 1918. The Commissioner of Internal Revenue rejected the claim for abatement in June, 1923. Inasmuch as the return for the year 1918 would normally be filed on or before March 15, 1919, it clearly appears that the determination by the Commissioner was made before the 5-year statutory period of limitations had elapsed, and thus the Onken case vitally differs from the instant case, in which the Commissioner purported to determine

a tax after all tax liability had been extinguished by the running of the period of limitation prescribed by the Revenue Acts.

In the case of *McCaughn vs. Philadelphia Barge Co.*, 27 Fed. (2d), (E. D. of Pa.) 628, the Commissioner of Internal Revenue in October, 1920, made an *additional assessment* against the taxpayer on account of its 1918 income. The taxpayer filed a claim for abatement and the bond on which suit was brought. It appears that on May 14, 1923, the Commissioner of Internal Revenue rejected the defendant's claim for abatement and found the additional tax to be correct. Here again we find that the Commissioner of Internal Revenue made his determination of the tax due within the statutory period prescribed by the Revenue Acts, thus clearly distinguishing the case from the instant one.

In the case of *United States vs. Rennolds*, 27 Fed. (2d), (S. D. of N. Y.) 902, it appears that the income tax return in question was filed on March 31, 1918, and that a claim for abatement and a bond were filed in April, 1922. On November 8, 1923, the Commissioner of Internal Revenue rejected the claim for abatement and demanded payment of the tax. It appears that in this one case alone do we have the situation in which the Commissioner purported to determine a tax to be due after the elapse of the statutory period of limitation prescribed by the Revenue Acts. In the Rennolds case, however, the defendant does not appear to have raised the point that the Commissioner was without power to make a valid determination of a tax after all tax liability had been extinguished and that consequently no liability could arise on the bond because the condition

could not then be breached. The Rennolds case would appear to decide only that the statutory period of limitation prescribed by the Revenue Acts for existence of tax liability and the remedies for collection of taxes do not apply to an *action* upon a bond. Moreover, there are two additional distinctions between the Rennolds case and the instant case. First, the bond given in the Rennolds case was to stay the collection of an *additional assessment* and was filed long after the original return was filed. It was not a bond such as we have here filed under Section 234 (a) (14) (a) in conjunction with the original return. Second, in the Rennolds case the determination by the Commissioner of the claim in abatement and hence the amount due under the bond was had on November 8, 1923. This was more than two years before the passage of Section 1106 (a) of the 1926 Revenue Act, which act extinguishes all tax liability upon the running of the statute of limitation. Hence, in the Rennolds case it might fairly be argued that though the remedy for the collection of the tax was barred, the tax liability was not extinguished at the time of the determination. In the instant case the determination was made after the enactment of Section 1106 (a) and hence clearly after the tax had been extinguished by statute as effectually as if it had been paid.

It is respectfully submitted, therefore, that the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case is clearly not in conflict with the case of *United States vs. Rennolds*.

The examination of these cases discloses that there is no such conflict between the decision by the Circuit Court of Appeals for the Seventh Circuit in the instant case and the decisions of the District Courts of the

United States as to warrant the granting of a petition for writ of certiorari in this case.

(c) ***The cases cited by the Government as being in accord with the decision in this case are likewise distinguishable and a decision by this court in United States vs. Maryland Casualty Company, No. 399, October Term, 1928, will decide the conflict in all of the cases cited by the Government and will not be affected by denial of the petition in this case.***

On page 5 of its petition the Government states that substantially the same question as is presented in the instant case has been certified to the Court by the United States Circuit Court of Appeals for the Ninth Circuit in the case of *United States vs. Maryland Casualty Company*, No. 399, October Term, 1928. With this contention respondent respectfully disagrees.

An examination of the certificate in that case discloses that the Commissioner in October, 1920, made an additional manufacturer's excise tax assessment for the period from March 1, 1919 to June 30, 1920. A claim for abatement was filed, together with a bond upon which the action was subsequently brought. The Commissioner of Internal Revenue considered the claim for abatement and rejected it on August 14, 1923. The determination of the tax due from the taxpayer was therefore made within the statutory period of limitation prescribed by the Revenue Acts, to wit, five years.

It is respectfully submitted, therefore, that the question raised in the instant case is not the same question nor substantially the same question presented in the certified case of United States vs. Maryland Casualty Company. There the Commissioner of Internal Revenue made a determination of existence of a tax liability with

in the period prescribed by the Revenue Act. Here, as stated before, the Commissioner attempted to make a determination of a tax after all tax liability had been extinguished by the running of the period of limitation prescribed by the Revenue Act.

In the case of *United States vs. Good Springs Anchor Company and Fidelity & Deposit Company of Maryland* (District Court for the Southern District of California, unreported), an examination of the complaint obtained by the respondent discloses the following situation to have been alleged by the Government: The Collector of Internal Revenue made an additional assessment against the defendant on account of its 1917 income. The taxpayer filed a claim for abatement on April 25, 1921. The claim was considered and rejected by the Commissioner of Internal Revenue on July 11, 1922, and due demand for payment therefor was made. Thereafter the taxpayer filed a bond, to-wit, on December 1, 1922, apparently to stay collection pending the reopening of the determination. It therefore appears that the bond was given to pay a fixed sum already determined by the Commissioner to be due, while in the instant case the bond was to pay such tax as might be determined by the Commissioner in the future. The determination by the Commissioner in the Good Springs Anchor Company case was within the statutory period prescribed by the Revenue Act and of course there can be no dispute as to his right or power to make such determination. In the instant case the purported determination was made by the Commissioner after the running of the period of limitation which extinguished all of the tax liability.

In the Maryland Casualty Company case certified to this Court, and also in the Good Springs Anchor Com-

pany case the decision was favorable to the taxpayer. However, the cases for the reasons given above are clearly distinguishable from the instant case and, therefore, although the taxpayer was successful in the last two cases discussed, it is respectfully submitted that they are not properly classed as being in accord with the instant case. In fact, if this Court takes jurisdiction of the certified case of United States vs. Maryland Casualty Company, No. 399, October Term, 1928, the decision in that case will terminate the conflict in all of the cases cited by the Government. This decision, however, by reason of the fact that in those cases, with the exception of the Rennolds case, supra, the determination by the Commissioner was made prior to the lapse of the statutory period of limitation, will not decide the issue in this case, and the denial of a writ of certiorari in the instant case will in no way affect the rights of the Government or the taxpayers in the case certified to this Court.

It is respectfully submitted, therefore, that there is no such conflict in the decisions of the Federal Courts as to require the granting of a writ of certiorari to the Government in this case, nor will the denial of such a writ affect the rights of the Government in the other litigation cited by it in its petition.

CONCLUSION

An examination of the facts and decisions by the Circuit Court of Appeals for the Seventh Circuit in the case of United States vs. John Barth Company, on the original hearing (R26) and upon rehearing (R30), shows that that case does not involve an important question of

general Federal law. The decision, it is respectfully submitted, is correct as to the legal principles applied and arises in a case under a section of the Revenue Act of 1918 affecting only income received during the fiscal or calendar year for 1918. Furthermore, the action is brought upon a bond given pursuant to Section 234 (a), 14 (a) of the Revenue Act of 1918, which was enacted by Congress to meet a particular situation arising by reason of the termination of the World War on November 11, 1918, and a similar provision does not appear to have been incorporated in Revenue Acts prior or subsequent to the Revenue Act of 1918.

An examination of the cases cited by the Government in its petition clearly discloses that they do not conflict with the decision in this case. Furthermore, the denial of a writ of certiorari in this case will not affect the rights of the Government in the certified case of United States vs. Maryland Casualty Company, No. 399, October Term, 1928. It therefore appears that the petition, which is predicated upon the alleged similarity of issues in certain cases pending and decided in the various district courts of the United States, is entirely incorrect in its major premise. The only thing that would be accomplished by granting the petition for writ of certiorari here is a decision of this particular case and of this particular tax. Such decision would affect no other cases and no other tax. Moreover, there is no likelihood of a future conflict in decisions, since no other similar case appears to be now pending in any of the district courts, and in addition, presumably none will arise at this late date on bonds under Section 234 (a) (14) (a) of the Revenue Act of 1918.

No attempt has been made to consider the merits of this case as we conceive that the argument and discussion thereon are proper only when and if this court takes jurisdiction by certiorari and not otherwise.

WHEREFORE, the respondents respectfully pray that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Sec. 234. (a) (14) (a) of Revenue Act of 1918. Act of Feb. 24, 1919. (40 Stat. L. 1057-96, C. 18.)

"At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss (whether or not actually realized by sale or other disposition) resulting from any material reduction (not due to temporary fluctuation) of the value of the inventory for such taxable year, or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed. If it is shown to the satisfaction of the Commissioner that such substantial loss has been sustained, then in computing the taxes imposed by this title and by Title III the amount of such loss shall be deducted from the net income."

Sec. 250 (d) of Revenue Act of 1918. Act of Feb. 24, 1919. (40 Stat. L. 1057-96, C. 18)

"Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the re-

turn was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

Sec. 250 (d) of Revenue Act of 1921. Act of Nov. 23, 1921. (42 Stat. L. 227, C. 136.)

"The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: *Provided*, That in the case of income received during the lifetime of a decedent, all taxes due thereon shall be determined and assessed by the Commissioner within one year after written request there-

for by the executor, administrator, or other fiduciary representing the estate of such decedent."

Sec. 277 (a) (2) of Revenue Act of 1924. Act of June 2, 1924. (43 Stat. L. 253, C. 234)

"The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

Sec. 278 (d) of Revenue Act of 1924. Act of June 2, 1924. (43 Stat. L. 253, C. 234.)

"Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made."

Sec. 278 (c) of Revenue Act of 1924. Act of June 2, 1924. (43 Stat. L. 253, C. 234.)

"This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or

proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

Sec. 277 (a) (3) of Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27.)

"The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

Sec. 278 (d) of Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27).

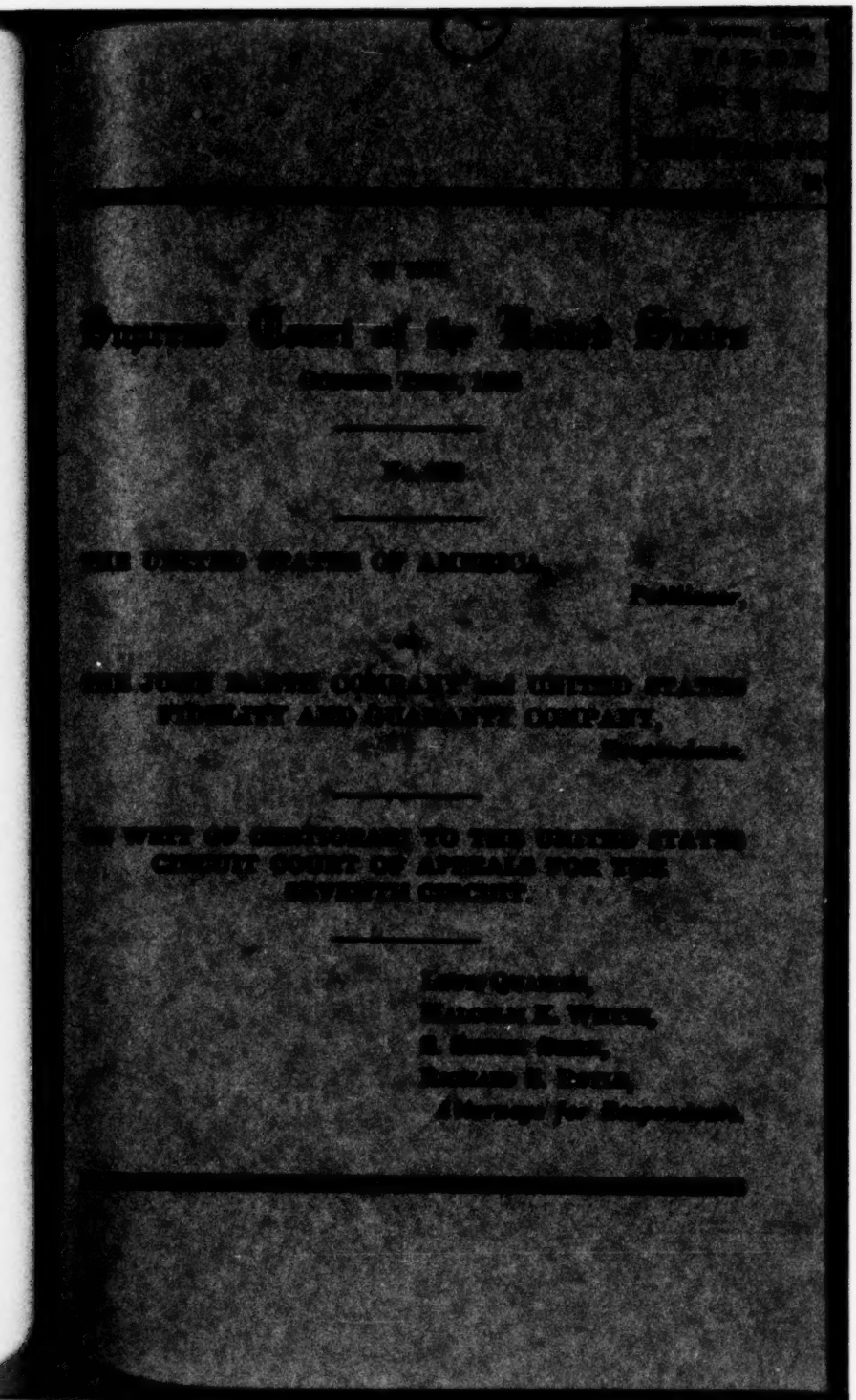
"Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

Sec. 278 (c) of Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27).

"This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act."

Sec. 1106 (a) of Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27).

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 526

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

THE JOHN BARTH COMPANY and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS, THE JOHN BARTH COMPANY, AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY

PRELIMINARY STATEMENT

The facts are presented in the brief on behalf of the United States, and we shall make only a brief resumé. The controlling statutes are set out in an appendix to this brief.

On May 15, 1919, The John Barth Company filed its income and excess profits tax return for the calender year

1918. The Revenue Act of 1918, in Section 234 (a) (11) (a) provided that a taxpayer could file a claim in abatement based on the fact that it had sustained a substantial loss resulting from any material reduction of the value of its inventory for such taxable year. Pursuant to this section of the Revenue Act of 1918, The John Barth Company filed its claim in abatement, and on September 20, 1919, a bond (R. 3-4) executed by The John Barth Company, as principal, and the United States Fidelity & Guaranty Company, as surety, was filed with the Collector of Internal Revenue, at Milwaukee, Wisconsin. The bond was conditioned upon payment, duly made by the principal, of such tax found by the Commissioner to be due, with interest, etc. On March 25, 1926, more than six years after the return was filed, the Commissioner of Internal Revenue purported to make a determination that a portion of the tax involved was due. The principal, after notice and demand, refused to pay the amount so found, whereupon this action was begun on the bond on September 22, 1926, seven years after the date of the filing of the taxpayer's income tax return, upon a determination made more than six years after the claim in abatement and bond were filed.

The District Court sustained a demurrer to the complaint and the case was certified to this court by the Circuit Court of Appeals for the Seventh Circuit, but was remanded with instructions that such proceedings be had as according to right and justice and the laws of the United States ought to be had. (276 U. S. 606, R. 15) On June 7, 1928, the Circuit Court of Appeals filed its opinion sustaining the decision of the District Court and denied rehearing September 12, 1928. (27 Fed. (2d) 782, R. 16-21). The case now comes before this court pursuant to the granting of a petition for a writ of certiorari from this court to the United States Circuit Court of Appeals for the Seventh Circuit. (R. 21)

The Revenue Act of 1918, Section 250 (d), provides that no determination or assessment shall be made and no suit or proceeding shall be begun for the collection of a tax under that Act after the expiration of five years from the date of filing the return, in this case, May 15, 1919.

The Revenue Act of 1921, Section 250 (d), is practically the same and refers to returns made under prior acts which would include the Revenue Act of 1918.

The Revenue Act of 1926 (February 26, 1926), Section 1106 (a), provided that the bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only bar the remedy but shall extinguish the liability.

Section 612 of the Revenue Act of 1928 repealed Section 1106 (a) of the Revenue Act of 1926 as of February 26, 1926.

THE ISSUE

The statement of the question presented, appearing on page 2 of the petitioner's brief, is respectfully submitted to be incorrect and misleading. A proper statement of the issue involved is as follows:

> May an action on a bond given under Section 234 (a) (14) (a) of the Revenue Act of 1918 "conditioned for the payment of any part of *such tax* found by the Commissioner to be due" be maintained when the Commissioner made no determination and found no tax to be due until after the running of the statutory period of limitation of the Revenue Acts within which determinations must be made? (Italics ours.)

The distinguishing feature of this case, which must not be lost sight of, is that the Commissioner of Internal Revenue made no determination of any tax nor found any tax to be due until after the period of limitation provided for in the

Revenue Acts had elapsed. The real issue in this case is not whether the statutes of limitation applicable to the tax liability are applicable to the suit on the bond as statutes of limitation. The issue is whether the discharge of the tax liability by operation of those statutes did not discharge the obligors on the bond from liability under their contract.

SUMMARY OF ARGUMENT

The liability of the respondents must be determined from the terms of their written contract, to wit: the bond. The primary obligation under the bond was the tax liability of the John Barth Company by which the obligation on the bond is to be measured. The bond was not drawn to pay a fixed sum or render a stated performance or to pay any amounts that remained "unpaid" but was an agreement to pay "such tax found by the Commissioner to be due," and required that there be "notice and demand by the collector." This language contemplates that the Commissioner in determining the "tax" must do so in accordance with the provisions of the Revenue Acts. The word "due" implies that the tax at the time of the determination must be then enforceable. The Commissioner in his determinations is bound by all of the revenue laws of the United States, including limitation provisions. The decision of the Commissioner on the claim in abatement was a determination expressly barred by Section 250 (d) of the Revenue Acts of 1918 and 1921, unless made within five (5) years after the filing of the return.

The Government's case rests upon ignoring the limitation in Section 250 (d) of the Revenue Acts of 1918 and 1921 upon the power of the Commissioner to determine the tax (Government's Brief pages 9-10). The pro forma assessment made on June 25, 1919, was not a determination either under the language of the statutes nor under the language of

the bond which obviously referred to a determination to be made subsequent to the delivery of the bond.

It is well established that the liability of a surety is dependent on the existence of the principal debt at least when the bond is conditioned to pay the debt. In this case the principal debt was a tax liability. The Revenue Act of 1918 created the tax liability and fixed the period within which such liability could exist. On the expiration of the limitation period, the tax liability was extinguished in accordance with the general rule applicable to a liability limited by the statute creating it. Moreover, Section 1106 (a) of the Revenue Act of 1926 expressly provided that when a statute of limitations has run against the government, it should "not only operate to bar the remedy, but shall extinguish the liability." The determination was made after the expiration of the statutory period and the enactment of section 1106 (a) and hence was of no effect.

The filing of the bond did not constitute a waiver by the taxpayer of the limitation provisions. The Government's hand was not stayed and it could pursue its remedy at any time it chose to make its decision upon the claim in abatement. The language of the statute does not expressly extend the limitation period when a claim in abatement is filed, nor is there any language reasonably calling for such construction. The purpose of the bond was to give additional security during the time that the Commissioner might take to make his determination within the statutory period rather than to give the Commissioner both additional security and unlimited time.

Cases in which the determination was made *before* the expiration of the limitation period, thereby giving a cause of action on the bond, are not in point. Furthermore, the retroactive repeal of section 1106 (a) of the Revenue Act of

1926, which was merely a declaratory statute, did not purport to affect and did not affect the operation of section 250 (d) of the Revenue Acts of 1918 and 1921 by force of which the tax liability of the respondents was extinguished prior to any determination by the Commissioner of Internal Revenue. In case the repeal of section 1106 (a) by section 612 of the Revenue Act of 1928 be construed to recreate the respondents' liability on their contract of suretyship, which had once been extinguished, it is clearly unconstitutional in that it deprives them of their vested rights, contrary to the Fifth Amendment.

The limitation provisions of the Revenue Acts having operated to destroy the tax liability, which formed the obligation of the bond, before a cause of action on the bond ever arose, no action on the bond is now maintainable.

ARGUMENT.

CHAPTER I.

THE OBLIGATION UNDER THE BOND IS MEASURED BY THE TAX LIABILITY OF THE JOHN BARTH COMPANY. NO CAUSE OF ACTION HAS EVER ARISEN ON THE BOND BECAUSE NO TAX WAS DETERMINED TO BE DUE WITHIN FIVE YEARS AFTER THE RETURN WAS FILED.

(a) *The liability of the respondents must be determined from the terms of their written contract.*

The obligation under the bond is measured by the tax liability of The John Barth Company. The Government throughout its brief takes the position that the liability of The John Barth Company for income tax is immaterial in

this action brought by the Government on the bond. This action is one based upon a written obligation and in determining the rights of the parties thereto it is necessary to examine the terms of the written instrument. The bond by its terms provides that it is given pursuant to Section 234 (a) (14) (a) of the Revenue Act of 1918. That section of the Revenue Act provides that at the time of filing the return for the taxable year 1918 a taxpayer might file a claim in abatement based on the fact that he had sustained a substantial loss resulting from a material reduction of the value of his inventory for the taxable year 1918 or from the actual payment in 1919 of rebates in pursuance of contracts entered into during the year 1918 upon sales made in 1918. A bond given pursuant to this section of the statutes contemplated that information obtained in the year 1919 might be used in readjusting the value of 1918 inventories and that rebates paid in 1919 might be credited to the taxpayer in computing his 1918 income tax. Inasmuch as the information in question could not be obtained until after the close of the taxable year, Congress provided in Section 234 (a) (14) (a) that, upon the filing of a claim in abatement and a bond, payment of the amount of tax involved in the claim would not be required until the claim was decided. The rule of self assessment and of immediate payment was done away with by Congress in this class of cases. Under this statute there was no duty on the taxpayer to make payment of the amount of the claim until his loss on a war inventory was determined if only the taxpayer would protect the Government from his intervening insolvency by filing a bond as security.

The question of what constitutes the taxable income of the taxpayer is definitely presented to the Commissioner for determination by the filing of both the return and the claim in abatement. Under the statute the net amount disclosed by the return and claim in abatement may quite as fairly be

considered the true taxable income of the taxpayer as the larger amount disclosed in the return alone. In fact it is submitted that the two documents should be considered together as constituting the return. In any event the taxpayer, having paid the net amount disclosed by the return and claim in abatement, has discharged his entire present statutory tax obligation and owes no further obligation until and unless the Commissioner shall later determine that an additional amount is due.

The respondents filed a bond (R. 34) such as was contemplated by Section 234 (a) (14) (a) of the Revenue Act of 1918 by the terms of which the taxpayer, as principal, and the United States Fidelity & Guaranty Company, as surety, agreed to pay $60,000.00 on condition that the agreement should be null and void if the principal, on notice and demand by the Collector, duly paid "any part of such tax found by the Commissioner to be due," with interest, etc. The language of the bond follows the language of the statute.

The obligation of the bond was to pay the existing tax liability of The John Barth Company when and if duly determined by the Commissioner. Bondsmen may agree that a certain definite fixed performance shall be rendered by them, or, on the other hand, they may merely undertake to pay whatever the principal is legally obligated to pay. These two undertakings are entirely different and the failure to appreciate this distinction appears throughout the petitioner's argument. The distinction has been very ably discussed by Professor Williston in his work on Contracts, Volume 2, paragraph 1213:

> "It is often said that the surety is not liable unless the principal is bound, but that this rule is subject to many exceptions. Such a statement omits an essential primary inquiry, namely, what are the terms of the con-

tract? It is possible for a surety to promise to pay whatever debt the principal may owe. On the other hand, the surety's promise may be to pay a stated sum or render a fixed performance for which the principal also purports to bind himself. If the contract is of the former sort it is obvious that by the very terms of his contract the surety is liable for nothing if the principal is under no liability; and statements not infrequently made that a surety cannot be liable unless a principal debtor is liable have reference to such case and must be confined to it. On a fair interpretation where the surety's promise relates to a specific transaction, it will generally be found that his promise must be construed as one to pay an agreed sum or to perform a duty fixed by some other standard than the obligation which the principal debtor may be under. On the other hand, where a surety makes a general promise to answer for such debts or obligations as the principal may be liable for in a certain business or series of transactions, he is likely to define the obligations for which he himself will be answerable as such debts or obligations as the principal debtor may be bound to discharge. The latter class of cases then offer no other difficulty than to determine whether the principal debtor is under any obligation, and attention must be directed to the former class."

We are dealing with a bond under Professor Williston's first group, namely, an obligation "to pay whatever debt the principal may owe," and accordingly the obligation of the bond is to be measured by the liability of The John Barth Company for taxes.

The importance of considering the exact language of the surety contract before entering upon generalizations as to the effect of surety bonds, is emphasized by the decision of the Circuit Court of Appeals in this case where it says:

"Inasmuch as the parties agreed to pay 'any part of such *tax* found by the Commissioner to be due' there

was no obligation to pay what had been *extinguished* prior to the commencement of this action.

"This distinction may at first seem to be a refined one, but it is predicated upon the rule that the surety is justified in construing his contract strictly.

"That the parties might have agreed to pay a sum of money rather than a tax cannot be questioned. Likewise they had the option of submitting an agreement where the liability was limited to the payment of a *tax*. In the agreement under consideration, defendants agreed merely to pay the tax. The tax having been extinguished, the government cannot enlarge by construction of words, or otherwise, the obligation of the parties." (R. 18)

In the recent case of *Bowers vs. American Surety Company*, (C. C. A. 2nd Circ.) 30 Fed. (2d) 244, the bond provided that the surety would pay so much of an additional assessment as remained unpaid. The court indicated very clearly that if the bond had been only for such amount as might be "due", a different question would be involved and said:

"The condition was not that the L. C. Blancke Company should pay the tax due, but the tax assessed so far as the Commissioner should not abate it within the year."

(b) ***The language of the bond contemplates that before liability can attach under it, the commissioner must have determined a "tax" in accordance with the provisions of the Revenue Acts.***

The language of the bond follows the language prescribed by the statute (Section 234 (a) (14) (a), Revenue Act of 1918), and provides that:

"The condition of the foregoing obligation is such that if the principal shall on notice and demand by the collector, duly pay any part of such tax found by the

> commissioner to be due with interest * * * and shall otherwise well and truly perform and observe all of the provisions of law and the regulations, then this obligation is to be void, but otherwise to remain in full force and virtue."

The court's attention is invited to the fact that the bond stipulates for "notice and demand by the collector" on the principal (the taxpayer). In other words it contemplates that when the Commissioner has made his finding, such finding shall be reduced to the form of a tax assessment and be demanded by the collector in the usual manner which obviously must be within the statutory period. It will further be noted that the expression used is "such tax" as is "found by the commissioner to be due". Do not these words clearly require that at the time the Commissioner determines "such tax" he must take into account whether or not the sum in question is still "due" as a "tax" or whether a statute of limitations has run on it? To hold otherwise would seem to make the words "to be due" meaningless. The Internal Revenue Department itself has construed the word "due" when used in tax statutes as implying that the statute of limitations has not run. We refer to Law Opinion No. 1095 of the Solicitor of Internal Revenue published in C. B. I-1, (1922), page 314, where the Solicitor says:

> "It is believed, however, that the expression 'then due' as contained in Section 252 (Revenue Act of 1921), is used in a more restricted sense than simply 'owing' and has reference to an enforceable claim on the part of the government."

We submit, therefore, that when the Commissioner determines the claim of abatement, he must first, under the terms of the bond, reduce his determination to the form of a tax, give notice and make demand for the tax in the manner provided in the Revenue Act for taxes; and in making his deter-

mination he is governed by all the law applicable to taxes, including statutes of limitation. Failing in this the Commissioner can claim no rights under the bond.

The Government's contention seems to carry with it a very obvious fallacy. It amounts to this: That the Commissioner in determining the tax may disregard the fact that The John Barth Company is not liable for any tax. This seems in itself to be a contradiction in terms. Either the Commissioner in his determination must be controlled by the law, or he is free from any control in making his determination. If he is under no obligation to respect the limitation provisions, Section 250 (d) of the Revenue Act of 1921 and Section 1106 (a) of the Revenue Act of 1926, in making his determination, is he under any obligation to respect any other requirement of the law? Could he have assessed a tax in the amount of a million dollars in the instant case on a total net income of much less than that amount? Could he have determined it at twice the statutory rates? Could he have determined the tax although his record showed that it had been paid by the taxpayer? If the tax were "extinguished" in some other manner, beside payment, could he still "determine" it to be due? Could he defer the determination of the tax for fifty years and then proceed at his pleasure claiming that the liability did not attach on the bond and the statute of limitations start to run until 1969? Obviously the Commissioner, under the terms of the bond, could not proceed arbitrarily. This bond, conditioned in statutory terms, did not confer unlimited and unrestrained authority on the Commissioner to determine its obligation. He was bound by the Internal Revenue law. If he was bound by any of it, he was bound by all of it.

The theory of the Government that the Commissioner in determining any claim of abatement where a bond is filed need not be controlled by the law governing tax liability

would repose in him power such as Congress certainly never contemplated and such as no one has heretofore imagined. When Congress passed Section 234 (a) (14) (a) of the Revenue Act of 1918, which provided that the bond should be "conditioned for the payment of any part of such tax found to be due" by the Commissioner, it certainly meant that such finding must be in accordance with law.

Congress did not intend to exact as a price for proceeding under Section 234 (a) (14) (a) a solemn promise under seal to pay any determination made by the commissioner, legal or illegal. This court has not looked with favor upon any construction of the revenue statutes which seeks to repose arbitrary and uncontrolled discretion in the Commissioner of Internal Revenue. In the very recent case of *Blair vs. Oesterlein Machine Company*, 275 U. S. 220, 48 S. Ct. 87, 72 L. ed. 24, the claim was advanced that under the special assessment provisions of Sections 327 and 328 of the Revenue Act of 1918, the Commissioner's determination of the proper comparatives to be used was not subject to review. This court held that there was no basis for such an unreasonable construction of the statute and could find no justification for "the supposedly sacrosanct character of his determination under paragraphs 327 and 328." We do not think that the court in the instant case should look with any more favor on the claim now advanced by the Government for another type of "sacrosanct" determination.

The fallacy that the determination of the Commissioner provided for in the bond may mean an arbitrary determination made by him rather than a determination under the statutes, is demonstrated by considering the effect of the sections of the Internal Revenue acts now providing for appeals to the Board of Tax Appeals. Under the provisions of Section 274 (a) and 283 (c) Revenue Act of 1926, (set forth in the appendix), a taxpayer has a right to appeal to the Board

of Tax Appeals from any determination of a deficiency by the Commissioner. Let us assume that in the instant case the taxpayer had filed an appeal to the Board of Tax Appeals, which he could do as the determination of the tax liability was made after the passage of the 1926 Revenue Act. In such event the Board of Tax Appeals would have complete jurisdiction over the additional tax, penalty and interest as well as the tax shown on the original return, and over-payments, if any. *Peerless Woolen Mills vs. Rose, Collector of Internal Revenue*, 28 Fed. (2d) 661; *Williamsport Wire Rope Co. vs. U. S.* 277 U. S. 551; 48 Sup. Ct. 140; 72 L. ed. 985. It is very clear under the above cases that the full administrative consideration of the tax and hence the final determination of the Commissioner is not complete until the review by the Board of Tax Appeals.

Let us assume in the instant case that such an appeal had been taken and that the Board of Tax Appeals had reversed the Commissioner's determination and found that the claims in abatement should have been allowed. Could the Commissioner in such event nevertheless sue on the bond claiming that he had determined the tax to be due and that he had a cause of action under it? Would it not be anomalous to hold that bondsmen should be compelled to pay taxes which the Board of Tax Appeals had decided under the laws were never due or owing and which found their justification only in errors of the Commissioner?

We submit therefore that the bond in this case was given for the purpose of securing the payment of such tax as the Commissioner might lawfully determine was owing to the United States by The John Barth Company. It appears to us to be clear from the terms of the bond itself, that the obligation of the surety was measured by the tax liability of The John Barth Company and that unless the Commissioner of Internal Revenue *lawfully* determined that a tax was due,

there could be no breach of the bond. To hold otherwise would be to require the surety to agree to pay the amount of money determined by the Commissioner to be due as a tax without regard to the existence of any tax liability on the part of the principal.

The petitioner in its brief seems to argue that a taxpayer and surety in signing a bond are barring themselves completely from asserting defences based on the validity of the tax determination. The argument seems to be implied that the moment such an undertaking is entered into the taxpayer and his surety are no longer interested in the merits of the tax controversy under consideration, but are completely subject to the arbitrary caprice of the Commissioner in making his determination. This argument goes too far. It appears to take away from a surety bond conditioned to pay a tax the ordinary character of a bond and convert it into a type of blank check or demand judgment note.

There is one case that appears to go to such extent. That case is *Gray Motor Co. vs. United States*, 16 Fed. (2d) 367, cited on pages 19 and 20 of the Government's brief. The doctrine of that case, we submit, is not only poorly reasoned but is obviously dictum as the court found that the statute of limitation had not in fact run. In addition, it is the settled law in this court that in an action on a bond to pay a tax, the surety can introduce defences on the merits to show that the particular tax was not owed. *U. S. vs. Rindskopf*, 105 U. S. 418; 26 L. ed. 1131.

In the instant case, therefore, no cause of action has ever arisen on the bond because no tax was determined to be due at a time when the Commissioner had lawful authority to determine any tax liability. The return of The John Barth Company was filed May 15, 1919, and the bond in question filed September 20, 1919, but not until March 25, 1926, did the

Commissioner purport to make a determination of the tax due from The John Barth Company.

(c) *The decision of the Commissioner on the claim in abatement is a determination which is expressly barred by Section* 250 (d) *unless made within five years after the filing of the return.*

Section 250 (d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265) provides that:

> " * * * the amount of any such taxes due under any return made under this act for prior taxable years or under prior income, excess profits, or war profits tax acts * * * shall be *determined* and assessed within five years after the return was filed. * * * " (Italics ours).

The phrase in the bond "found by the Commissioner to be due" means "determined" by the Commissioner to be due *within the limit of time fixed by the Revenue Act itself.* His purported determination after that time is contrary to law and of no effect.

The original assessment on June 25, 1919, by the Commissioner of a tax in the sum disclosed by the original return as filed is not material in this connection. That assessment did not involve the determination of an issue but was based upon the information disclosed by the return. It is the "self-assessment" which is a well known feature of federal income taxation. It is a purely ministerial posting of the amount shown on the taxpayer's return and is in no sense an administrative determination. No opportunity arose for the making of any "determination" until the claim for abatement had been filed. Then, for the first time, an issue was raised between the taxpayer and the Government calling for a "determination" by the Commissioner. Such construction of the term "determination" finds able support in the well considered decision by the Board of Tax Appeals in the *Ap-*

peal of Terminal Wine Co., 1. B. T. A. 697, decided February 28, 1925, an excerpt of which is set out below.

> "The *determination* from which a taxpayer may appeal is one which fixes the amount of *deficiency* in tax. It is the final decision by which the controversy as to the deficiency is settled and terminated, and by which a final conclusion is reached relative thereto and the extent and measure of the deficiency defined. *An assessment* made without compliance with the statutory remedy of appeal contained in section 250 (d) of the Revenue Act of 1921, and against which a claim for abatement is received for consideration by the Commissioner, does not meet the definition of a determination above given. The listing of an assessment followed by a notice to the taxpayer that an abatement claim will be received and the correctness of the amount of the tax later settled on the merits of the controversy (or the acceptance of such a claim for consideration without such notice) effectually refutes the idea that the assessment is a *determination* as above defined. The statute, for the purpose of protecting the public revenue, authorizes the Commissioner under certain circumstances to assess taxes without benefit to the taxpayer of his statutory right to a determination prior to such assessment. Such assessments are familiarly referred to as *summary*, *jeopardy*, or *noncompliance* assessments. These terms are loosely used and frequently interchangeably, though strictly speaking they are not the same. However, in any such case, where the Commissioner so assesses a tax and thereafter accepts an abatement claim in which are set up the contentions of the taxpayer against the deficiency assessed, the issue between the taxpayer and the Commissioner is then set up and it is then that a controversy arises between the parties. It must be apparent that to hold that the assessment constitutes the determination, or presupposes (under these circumstances) a determination, is to hold that the issues are determined before they are raised and before the controversy arises. To so hold would necessarily deprive the taxpayer of a determi

nation *on the issues*. A controversy settled and decided before there is a controversy is not a controversy at all. As defined above a *determination* must be a settling of an existing controversy susceptible of consideration, decision, and conclusion—and a *termination* thereof. That which has not begun can not be terminated."

We also refer the court to *Appeal of New York Trust Co.* 3 B. T. A. 583, where court said:

> "The determination from which a taxpayer may appeal is one which fixes the amount of deficiency in tax. It is the final decision by which the controversy as to the deficiency is settled and terminated, and by which a final conclusion is reached relative thereto and the extent and measure of the deficiency defined. Appeal of Terminal Wine Company, supra, page 701. If, therefore, the determination made by the Commissioner is not the determination of a deficiency as defined by the statute, then jurisdiction does not obtain."

Any other construction of the limitation on the determination of the tax is inconsistent with the provision of the 1921 Act immediately following it:

> "The amount of any such taxes due under any return * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later *determination*, assessment and collection of the tax." (Italics ours).

In the words of a recent opinion of this Court in the case of *Bowers, Collector of Int. Rev. vs. New York & Albany Lighterage Co.*, 273 U. S. 346, 47 S. Ct. 389, 71 L. ed. 676,

> "A reasonable view of the matter is that it was the intention of Congress by the clause (Section 250 (d) here in question to protect taxpayers against any proceeding whatsoever for the collection of tax claims not made and pressed within five years."

We believe that the construction of Section 250 (d) laid

down in that case with regard to collection of taxes is equally and necessarily controlling with respect to the co-ordinate requirement of determination. This court there said, in referring to the Government's contention that Section 250 (d) did not bar a distraint proceeding:

> "Petitioner's construction of the limitation is inconsistent with the provision immediately preceding it. 'The amount of any such taxes due under any return * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and *collection* of the tax.' If collection by distraint were not barred by Section 250 (d) it would not be necessary to have this general consent of taxpayers that collection, as well as determination and assessment, might be made after the lapse of the prescribed period."

In other words, we submit that a condition precedent to the existence of a cause of action on the bond was never performed, namely, the lawful determination that a tax was due.

The power of the Commissioner to determine the tax liability of The John Barth Company under the Revenue Act of 1918 ceased on May 14, 1924, or five years after its return was filed. His inability thereafter to find "any tax to be due" rendered impossible the accrual of any cause of action on the bond.

CHAPTER II.

THE LIABILITY ON A BOND IS DISCHARGED WHEN THE PRIMARY DEBT OF THE PRINCIPAL SECURED THEREBY IS EXTINGUISHED. HERE THE PRIMARY DEBT (THE TAX LIABILITY) WAS EXTINGUISHED BEFORE THE COMMISSIONER PURPORTED TO FIND ANY TAX TO BE DUE.

(a) *The Liability of a Surety is Dependent on the Existence of a Principal Debt.*

The rule is firmly established that where the primary debt of the principal is extinguished, the liability on the bond given to secure the same ends.

We invite the court's attention to the leading case of *Gages Executors vs. Cassidy*, 23 How. 109; 16 L. Ed. 430. In this case an administrators' bond, executed by the two administrators and a surety, had been sued upon and judgment given against the surety in some $8,000. Subsequently in the proceedings before the Probate Court having jurisdiction of the estate, the liability of the administrators to the estate which had formerly been set at some $8,000 had been reduced to approximately $800. A proceeding was then started by the surety for the purpose of being relieved and this court allowed relief on the ground that the liability of the principals for the principal debt to the estate having been extinguished, at least in part, the surety's liability on the bond should be correspondingly extinguished, and said:

> "The natural limit of the obligation of a surety is to be found in the obligation of the principal; and when that is extinguished, the surety is, in general, liberated."

See also:

Veach vs. Rice, 131 U. S. 293; 33 L. Ed. 163;

U. S. vs. Chouteau, 102 U. S. 603; 26 L. Ed. 246;
U. S. vs. Alexander, 110 U. S. 325; 28 L. Ed. 166.

This general principle has recently been reaffirmed in a case analogous to the one here involved. In *Galveston H. & S. A. Ry. Co. vs. Webster Co.*, 27 Fed. (2d) 765, an action was brought on a bond to recover charges for freight in interstate commerce more than three years after the cause of action accrued and it was held that the action was barred by the three year statue of limitations set forth in the Interstate Commerce Act, Section 16, Subsection 3, as amended by the Transportation Act of 1920, Section 424. The decision in that case stated:

> "That statute provides something more than a limitation of the time within which suit is to be brought. By its terms, failure to sue within the time fixed absolutely destroys further right of action. There can be no saving exception accorded the surety by the local law. Principal and surety stand on the same footing in this case. The action is destroyed by the supreme law. The cause of action no longer exists against either principal or surety."

(b) *The Primary Obligation in this Case was only a Limited Right and was Extinguished by the Statute of Limitations.*

The primary tax liability here involved arose solely by virtue of the Revenue Act of 1918. That Act authorized the collection of taxes under certain circumstances, from certain individuals at certain rates provided it was done within a certain time. The same statute which gave and defined the right to collect, limited the time within which the tax must be determined and collected. In other words, it created a limited right, and a correlative limited liability. The same principle governs the limited liability imposed by the Revenue Laws, as governs the statutory liability created under

statutes similar to Lord Campbell's Act, the Employers' Liability Act, and others. The distinguishing characteristic of this type of liability is that the very statute which creates the liability limits the period in which that new liability may exist. In such cases bringing the action within the time provided by the statutes is a condition precedent to the existence of the liability itself. Such statutory provision is not, strictly speaking, a statute of limitation. It is a delimitation of the extent of the right itself, and therefore, when the period of time in question has run without action having been brought, the right itself and not merely the remedy has been extinguished. Thus we find it stated in the case of *The Harrisburg*, 119 U. S. 199; 30 L. Ed. 358, at page 362, that:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. *It is a condition attached to the right to sue at all.*" (Italics ours).

We also respectfully refer the court to *Citizens Bank of LaFourche vs. Miller-Link Lbr. Co.*, 16 Fed. (2d) 163, in which it was said with reference to Section 250 (d) of the Revenue Act of 1921:

> "The language of the statute strikes me as being within itself conclusive of the question involved. The law that creates the right to collect the taxes by its terms, provides that no suit or proceeding for the collection of them shall be begun after the expiration of five years after the date when the return was filed. The claim becomes to all intents and purposes extinguished after that time. It is the policy of the government that claims after that lapse of time shall be uncollectible in court. This construction, as far as I have been cited to

cases and my own investigation extends, has been sustained by all the courts to which the question has been presented. *DuPont vs. Graham*, (D. C. 283, F. 300; *Seaman vs. Bowers*, (C. C. A.) 297, F. 371; *New York & Albany Lighterage Co. vs. Bowers*, (D. C.) 4 F. (2d) 604."

Davis vs. Mills, 194 U. S. 453, 48 L. Ed. 1067.
In this latter case the court said (page 454):

"It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure and as belonging to the lex fori, as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not."

In a recent decision of this court in *William Danzer & Co. vs. Gulf & Ship Island Ry. Co.*, 268 U. S. 633; 69 L. Ed. 1126, this court said with respect of running of the statutory limitations:

"But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act (cases cited), and those arising under the *Federal Employers' Liability Act* * * *" (Cases Cited).

See also to the same effect:

Central Vermont R. Co. vs. White, 238 U. S. 507, at 511, 59 L. Ed. 1433, 1436

Galveston H. & S. A. Ry. Co. vs. Webster Co., 27 Fed. (2d) 765.

Goce vs. Nichols, (D. C., Mass.) 23 Fed. (2d) 856.

Atlantic Coast Line vs. Burnette, 239 U. S. 199, 60 L. Ed. 226.

37 Corpus Juris 686.

(c) *That the Tax Liability was Extinguished by Running of the Statutory Period also Appears from the Provisions of Section* 1106 (a) *of the Revenue Act of* 1926.

Section 1106 (a) of the Revenue Act of 1926, 44 Stat. 113, reads:

> "The bar of the statute of limitations against the United States in respect of any Internal Revenue tax shall not only operate to bar the remedy but shall extinguish the liability. * * * "

It has already been demonstrated in the previous chapter that the statutory period of five years provided by Section 250 (d) of the Revenue Act of 1918 barred assessment, determination, and collection of any tax. It is apparent, therefore, that the bar of the statute of limitations had operated at least against the remedies, and the express provisions of section 1106 (a) declaring that the liability is in such event extinguished, are applicable at least after February 26, 1926.

The word "extinguish" as used in Section 1106 (a) is certainly as broad as any that could be found to indicate the intent of the Congress. It is difficult for the mind to conceive of language any more emphatic than is here used.

The Government argues in its brief, pages 30-35, that Section 1106 (a) should be construed as limited in its application by reason of the fact that it was passed to relieve taxpayers from whom the Internal Revenue Bureau had wrongfully exacted taxes after the statute of limitations had run, and that its sole function is in cases where the taxpayer is bringing an action against the Government to recover such

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wrongfully exacted taxes. We do not think that the section can be given such a narrow construction. Its language is sweeping. The Revenue Law of 1926 took effect on February 26, 1926, one month before the Commissioner passed upon the claim in abatement and purported to determine the tax due. At that time the amount of tax due from the John Barth Company under its return had not been determined by the Commissioner, although more than five and nearly seven years had elapsed since the return was made. Furthermore, no suit or proceeding for the collection of the tax had been begun.

By Section 1106 (a) of the Act of 1926, the five year limitation, provided by Section 250 (d) of the Revenue Act of 1918, on the power of the Commissioner to determine and assess the tax and to institute suits or proceedings for its collection had operated to extinguish all tax liability. A limitation statute which operates to bar only the remedy is a mere procedural statute. A limitation statute, however, which operates not only to bar the remedy, but also to extinguish the liability, enacts a rule of substantive law which operates in favor of the debtor in all legal relationships in which his continuing liability or cessation of liability becomes material. If the continuing tax liability of the John Barth Company was essential to the determination by the Commissioner of the amount of tax due and thus was a condition precedent to the accrual of a cause of action on the bond, then the extinguishment of the tax liability, by Section 1106 (a) of the Revenue Act of 1926, prior to the attempted determination by the Commissioner on March 25, 1926, of the amount of tax due from the John Barth Company, constitutes a complete defense to this action on the bond.

We call the court's attention to the case of *Edward P. Mertz, plaintiff vs. Andrew Mellon, Secretary of Treasury,*

decided by the Supreme Court of the District of Columbia on January 20, 1928, (reported in Prentice-Hall Federal Tax Service for 1928, page 309). There the court said:

> "The Act of Congress of February 26, 1926, is in the following language:
>
> "'the bar of the statute of limitations against the United States in respect of any Internal Revenue tax shall not only operate to bar the remedy, but shall extinguish the liability.'
>
> "It seems clear to the Court that this enactment wiped out completely the tax against the plaintiff for the year 1920, whatever the correct amount of that tax may have been, and this being so, the threatened destraint is intended to collect that which has no existence. It is not, it seems to the Court, an attempt merely to collect a tax alleged to be illegal, but it has no existence at all since the enactment of the Act of February 26, 1926."

It follows therefore both because of the limited right created under the Revenue Act of 1918 as set forth above and also from the express provisions of Section 1106 (a) that the "right" as well as the remedy has been extinguished by virtue of the limitation provisions of the Revenue Acts. Where the right or liability has become non-existent obviously there can be no remedy to establish or enforce it. There is no provision under the law giving the Commissioner the power to create a tax liability where it is non-existent or to revive a tax liability which has become extinguished. He cannot create liability by his fiat. As stated in the recent decision of *Joy Floral Co. vs. Commissioner of Internal Revenue*, 29, Fed. (2d) 865, in which a deficiency assessment of taxes accruing under the Revenue Act of 1918 was not made until July 15, 1925:

> "It therefore appears that under the Revenue Act of 1918, if considered alone, the instant assessment would be invalid; for that Act provided without qualification

that the amount of tax due under any return should be determined and assessed by the Commissioner within five years after the return was due or made. The powers of the Commissioner, it may be noted, are purely statutory, and must be construed accordingly."

The Government has strongly contended in its brief that the retroactive repeal of Section 1106 (a) has nullified its effect. The respondents believe that this repeal was without effect on this case and shall consider it in the following chapter.

CHAPTER III.

COMMENTS UPON THE CONTENTIONS SET FORTH IN THE BRIEF OF THE GOVERNMENT.

(a) *The Government has mistaken the issue.*

Chapters 1 and 2 of the Government's brief are written under a misapprehension of the issues in this case. As already set forth, the action on the bond is not barred by the limitation provisions of the Revenue Acts in the sense that a limitation period has run since the cause of action under the bond arose. As we have already shown, the effect of the limitations provisions of the Revenue Acts was to discharge the entire obligation on the bond and prevent a cause of action ever arising under it for the reason that the limitations provisions of the Revenue Act destroyed the liability for a tax and the bond was given to pay a "tax".

On pages 10-13 of its brief the petitioner elaborately demonstrates that where one of two remedies to protect a single right is barred, the other may still be enforced. This is admitted law, but, we submit, has no application here. The only right the petitioner had in this case under the

surety bond was to collect from the obligors on the bond the amount of the tax determined by the Commissioner to be due. If the Commissioner never made a valid determination, there can be no cause of action on the bond. Not only did the petitioner lose its remedies for the collection of a tax as a tax *per se*, but all collateral obligations measured by the tax, necessarily became extinguished with the primary obligation. In other words, the entire right became destroyed and therefore there can be no remedy to enforce it.

(b) *The Circuit Court of Appeals was correct in holding that the filing of the bond was not a waiver or tolling of the limitation provisions.*

1. *The Internal Revenue Bureau did not construe the filing of a claim in abatement as a waiver.*

The Commissioner was not stayed, either in determining or collecting the tax. Section 234 (a) (14) (a) provides that upon the filing of a bond, payment of the "amount of the tax covered by such claim shall not be required until the claim is decided," but there was nothing to prevent the immediate determination of the claim and the commencement of an action upon it. The Commissioner had the time of the determination, and hence of collection, completely within his control at all times. Moreover, he was forewarned by the Revenue Act that he had only a limited statutory period within which to make his determination.

The regulations of the Commissioner of Internal Revenue clearly disclose that the Internal Revenue Bureau did not feel that the effect of Section 234 (a) or 214 (a) is to compel any stay of the collection of the tax. We cite Regulations 45, Article 1632, pertaining to the duties of the Collector under the Revenue Act of 1918 providing as follows:

> "The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the

tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund."

Likewise the Board of Tax Appeals has held in a number of cases that the filing of a claim in abatement does not constitute a waiver of the statutes of limitations provided in the Revenue Acts.

Appeal of Ocean Accident and Guaranty Corp., 6 B. T. A. 1045;
Florence L. Klein vs. Commissioner, 6 B. T. A. 617;
Wirt, Franklin vs. Commissioner, 7 B. T. A. 636.

It is likewise held that the filing of a bond with a claim in abatement does not operate to suspend the statute of limitations.

Shaffer vs. Commissioner, 12 B. T. A. 298;
American Powder Mills vs. Commissioner, 12 B. T. A. 305;
Lieber vs. Commissioner, 13 B. T. A. 1175;
Anderson vs. Commissioner, 15 B. T. A. 475.

2. *The Commissioner was not stayed as to the determination and hence not as to the collection of the tax.*

Under any theory of the bond filed here the Commissioner at any time could have proceeded to his determination and hence to an action to collect the tax at his pleasure. He was benefited by getting additional security and his hand was not stayed as to determination or collection.

Obviously, the tax as assessed upon the filing of the original return, gave the Commissioner a complete cause of action to collect it. The filing of the bond only prevented him from pursuing the remedies of collection for a portion

of it unless he should first go through the prerequisite of determining the claim. The rule is established beyond all controversy that where a preliminary step within the control of the creditor must be taken before resort can be had to the remedy, the cause of action will be barred if both such preliminary step and the initiating of the suit are not commenced within the statutory period and nothing, that does not prevent the enforcement of the remedy by action, will toll the statute of limitations.

We cite the following authorities as being conclusive on this proposition:

Amy vs. City of Watertown, 130 U. S. 320; 32 L. Ed. 953, 955.

"But when a party knows that he has a cause of action, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim, or instituting such proceedings as the law regards sufficient to preserve it."

Bauserman vs. Blunt, 147 U. S. 647, 37 L. Ed. 316, 320:

"In the absence of express statute or controlling adjudication to the contrary, two general rules are well settled. 1st. When the statute of limitations has once begun to run, its operation is not suspended by a subsequent disability to sue. *Walden vs. Gratz*, 14 U. S. 1, Wheat. 292 (4:94); *Mercer vs. Selden*, 42 U. S. 1 How. 37 (11:38); *Harris vs. McGovern*, 99 U. S. 161 (25:317); *McDonald vs. Hovey*, 110 U. S. 619 (28:269); 2nd. *The bar of the statute cannot be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or to preserve his claim, Richards vs. Maryland Ins. Co.*, 12 U. S. 8 Cranch, 84 (3:496); *Braun vs. Sauereein*, 77 U. S. 10 Wall. 218 (19:895); *United States vs. Wiley*, 78 U. S. 11 Wall. 508, 513, 514 (20:211, 213); *Kirby vs. Lake Shore & M. S. R. Co.* 120 U. S. 130,

140 (30:569, 573); *Amy vs. Watertown*, 130 U. S. 320, 325 (32:953,956)." (Italics ours).

The requirement of determination as a prerequisite to the commencement of an action to collect taxes is analogous to the necessity of obtaining leave of a court to sue before an action may be commenced. In the following case the Supreme Court of Minnesota said with reference to an action on an official bond:

> "His cause of action (if any he has) accrues independent of and prior to the application for leave, and is the very basis upon which the application rests; and hence a statute of limitations commencing to run from the date when his cause of action accrues, commences to run from the same time that it would commence if no such leave were required; that is to say, in a case like this at bar the statute commences to run from the time when the wrong complained of was done, and not from the time of obtaining leave to sue.
>
> * * * but to allow a party to extend the time within which he will bring his action upon an official bond against sureties as well as the principal, indefinitely, by postponing his application for leave to sue, is not only anomalous, but so contrary to the entire spirit, policy and purpose of statutes of limitation, and so impolitic in itself, that the question mentioned is one of very great practical and substantial importance, and there is no sensible reason why the obtaining of leave to sue, and the institution of the action should not both take place within the period limited for the bringing of the action."
>
> (Litchfield vs. McDonald, 35 Minn. 167, 28 N. W. 191.)

See also: *Wenton vs. Jones*, 160 Minn. 32, 199 N. W. 431; *Bogart vs. George K. Porter Co.*, 193 Cal. 197, 223 Pac. 959; *People vs. McGee*, 41 Cal. App. 727, 183 Pac. 289.

3. *Section 250 (d) and Section 234 (a) (14) (a) do not require a construction extending the statutory period.*

The filing of the claim in abatement and the bond required the Commissioner for the first time to exercise his powers of determination. Prior to that there was no controversy and no issue to be determined (see supra Chap. I). It did not extend the time for "determination". On the contrary, it brought into operation the part of Section 250 (d) limiting the determination to the period of five years after the return was made.

The Government has argued in its brief, (see pages 28 and 29) that the clear intent of Section 234 (a) (14) (a) was to substitute a bond free from any running of the statute of limitations as to so much of the tax as was covered by any undertaking given in pursuance to such section. We would first point out that there is no such express language in the section. If such a general and important result were intended, it would seem that the statute would have said so in fairly specific language.

The filing of the bond did not postpone the time within which the Commissioner was required by Section 250 (d) to "determine" the tax or in which a suit or proceeding for the collection of the tax should be begun since it did not constitute a "consent in writing" by both the Commissioner and the taxpayer to a later determination or collection of the tax.

Section 250 (d) of the Revenue Act of 1921 provides:

> "The amount of income, excess profits or war profits taxes * * * due under any return made under this act for prior taxable years or under prior income, excess profits or war profits tax act * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax, and no suit or proceeding for the collection of any such taxes due * * * under prior income, excess profits or war profits tax acts * * * shall be begun

after the expiration of five years after the date when such return was filed."

This statutory provision provides the method of postponing the time in which determination, assessment and collection of the tax may be effected, and that is by a consent in writing of both the Commissioner and the taxpayer.

Under the principle of "*expressio unius est exclusio alterius*" which Mr. Justice Baldwin in *U. S. vs. Arredondo*, 6 Pet. 725; 8 U. S. (L. Ed.) 547, 560, described as "a universal maxim in the construction of statutes," it is a general principle of interpretation that the mention of one thing implies the exclusion of all others. This principle is certainly applicable to revenue laws which are "to be interpreted liberally in favor of the taxpayers."

Bowers vs. N. Y. & Albany Lighterage Co., 273 U. S. 346; 47 Sup. Ct. 389; 71 L. Ed. 676.
Gould vs. Gould, 245 U. S. 151, 62 L. Ed. 211.
Merriam vs. U. S., 263 U. S. 179, 68 L. Ed. 240.

It seems significant to us that the petitioner in its brief does not dispute the correctness of the Circuit Court of Appeals decision in holding that because Section 250 (d) provides an express method for waiving or tolling the limitations provisions of the statute an implied waiver cannot be read out of Section 234 (a) in view of established principles of statutory construction. (R. 18-19).

The filing of the bond and the claim for abatement did not constitute a consent in writing by both the Commissioner and the taxpayer, to postpone the time within which the Government was required to determine, assess and collect the tax. Consequently it operated to postpone neither the time for the determination of the tax, nor its collection.

Section 234 (a) (14) (a) is followed by the administrative

provisions of the Revenue Act as to enforcement and collection of tax liability, among them being Section 250 (d) restricting the assessment, determination and collection of taxes to a five-year period. It follows, therefore, that Section 250 (d), by accepted rules of statutory construction, was intended to apply to taxes coming under the provisions of Section 234 (a) (14) (a) just as it applies to the other substantive provisions of the Revenue Act.

The hand of the Commissioner under the statute was not stayed. The claim in abatement could be filed, the claim determined and rejected, and the action commenced all on the same day. It seems, then, a very sweeping assumption to claim that in a situation such as this, where the Commissioner can at any time perform the prerequisite to bringing his action, the statutes should be construed, nevertheless, to give him an unlimited time within which to perform such prerequisite.

A bond filed in connection with a return asking for a determination of the correct statutory tax under the provisions of 234 (a) is not intended, to our mind, to protect the Government *beyond* the statutory period of limitations nor impliedly to waive the limitation provision protecting the taxpayer. Is it not much more reasonable to suppose that the sole purpose of requiring a bond is to protect the Government *during* the statutory period of limitations? We doubt very much whether any surety company, if it had been confronted with the present contention of the petitioner that all statutes of limitations governing taxes are abrogated by the filing of such a bond and that the Commissioner may retain and consider such a claim indefinitely, would ever have entered into such a surety contract.

4. *The filing of the second claim in abatement after the running of the statute of limitations was ineffectual.*

It is contended by the Government on pages 29-30 of its brief that the fact that the respondents filed a second claim in abatement after the running of the statute of limitations on March 17, 1925, is pertinent to this case. It is respectfully submitted that this filing of the second claim in abatement was ineffectual and does not vary the rights of the parties in this action.

In the recent decision in *Joy Floral Co. vs. Commissioner of Internal Revenue*, 29 Fed. (2d) 865, it was held that even an express consent to the extension of time for assessment made after the lapse of the 5-year period of limitation was ineffective to revive the Commissioner's authority to make an assessment after the bar of the statute had intervened.

See also *Walsh vs. Price*, (E. D. of N. Y.) November 20, 1928, Reported C. C. H. 1929 Vol. III, p. 8072.

(c) *The cases cited by the Government are distinguishable.*

Several cases are discussed in the Government's brief, pages 17-27, on the theory that they are applicable to the present case. With the exception of the decision in the case of *United States vs. Reynolds*, 27 Fed. (2d) 902, each of the cases is distinguishable for the reason that the determination of the Commissioner was made prior to the running of the statute of limitations.

In the case of *United States vs. Ouken Bros. Company, Inc.* 23 Fed. (2d), (Wyo.) 367, it appears that a claim for abatement and a bond were filed with respect to an additional assessment of income tax for the year 1918. The Commissioner of Internal Revenue rejected the claim for abatement in June, 1923. Inasmuch as the return for the year 1918 would normally be filed on or before March 15, 1919, it clearly appears

that the determination by the Commissioner was made *before* the five year statutory period of limitations had elapsed, and thus the *Onken* case vitally differs from the instant case, in which the Commissioner purported to determine a tax *after* all tax liability had been extinguished by the running of the period of limitation prescribed by the Revenue Acts.

In the case of *McCaughn vs. Philadelphia Barge Co.* 27 Fed. (2d), (E. D. of Pa.) 628, the Commissioner of Internal Revenue in October, 1920, made an additional assessment against the taxpayer on account of its 1918 income. The taxpayer filed a claim for abatement and the bond on which suit was brought. It appears that on May 14, 1923, the Commissioner of Internal Revenue rejected the defendant's claim for abatement and found the additional tax to be correct. Here again we find that the Commissioner of Internal Revenue made his determination of the tax due *within* the statutory period prescribed by the Revenue Acts, thus clearly distinguishing the case from the instant one.

In the case of *United States vs. Reynolds*, 27 Fed. (2d) 902, it appears that the income tax return in question was filed on March 1, 1918, and that a claim for abatement and a bond were filed in April, 1922. On November 8, 1923, the Commissioner of Internal Revenue rejected the claim for abatement and demanded payment of the tax. The Commissioner purported to determine a tax to be due after the lapse of the statutory period of limitation prescribed by the Revenue Acts. The defendant, however, does not appear to have raised the point that the Commissioner was without power to make a valid determination of a tax after all tax liability had been extinguished. The case would thus appear to decide only that the statutory period of limitation prescribed by the Revenue Acts for the existence of tax liability and the remedies for collection of taxes do not apply to bar the enforcement of a cause of action which has attached

under a bond. Moreover, the *Rennolds* case is distinguished from the instant case in two respects: In the first place, the bond was not one filed under Section 234 (a) (14) (a) which contemplates that the bond be filed with the original return or at least prior to the fourth quarterly payment of the tax. In the second place, in the *Rennolds* case the determination by the Commissioner of the claim in abatement and hence the amount due under the bond was made more than two years before the passage of Section 1106 (a) of the Revenue Act of 1926. Hence in the *Rennolds* case it might fairly be argued that although the remedy for the collection of the tax was barred, the tax liability was not extinguished at the time of the determination. In the instant case, however, a determination was made after the enactment of Section 1106 (a) of the Revenue Act of 1926 and hence clearly after the tax had been extinguished as effectually as if it had been paid.

Furthermore, a hypothetical case put by the learned District Judge shows conclusively that he did not have in mind a situation such as is presented by the bond in this case. The case put was:

> "Could it be contended that, if C should undertake in writing to A that he (C) would pay A for all merchandise sold on open account to B, and A thereafter should sell B such merchandise, but fail to collect from B within a 5 year statutory limitation upon open accounts, he could not recover from C upon the latter's written contract within a 10 year statutory limitation period? The negative answer is obvious."

We concur in the learned Judge's answer to his own question, but in the present case an analogous proposition would be involved if C should undertake in writing to A that he (C) would pay A what might be due A from B for merchandise sold on open account. In this case if B's debt to A was extinguished, whether by payment or by a statute of limitations

extinguishing the right as well as the remedy surely the learned District Judge would not have contended that C would be liable to A upon his written undertaking. The decision in the *Reynolds* case shows clearly that the court in its decision entirely overlooked the distinction discussed by Professor Williston and set forth on page 8 of this brief.

In the case of *United States vs. United States Fidelity & Guaranty Co.*, 221 Fed. 27, it was never disputed but that there was a breach of the bond when the principal removed a large quantity of spirits without payment of the tax after giving a bond conditioned that "he shall in all respects faithfully comply with all the provisions of law relating to the duties and business of distillers."

That case is obviously distinguishable from the instant case in which the basic question at issue is whether there can be a cause of action on the bond where the primary obligation has been extinguished by the running of the period of limitations. The same comment applies to the case of *Raymond vs. United States, Fed. Case* 11596.

(d) *The petitioner's brief is unsound in attempting to construe Section* 234 (a) *and* 250 (d) *of the Revenue Act of* 1918 *by considering statutes enacted by Congresses* 8 *and* 10 *years later.*

On pages 35 to 38 of its brief the petitioner asks the court to construe Sections 234 (a) and 250 (d) of the Revenue Act of 1918 by assuming that the legislative purpose expressed in 283 (l) of the Revenue Act of 1926 and in Section 607 and 611 of the Revenue Act of 1928, was expressive of the intent of the Congress of 1918. It is plain that the sections in question do not purport to be retroactive except as stated therein and that they are not directions to a court to guide construction and do not purport to be. Moreover, the particular statutes relied on were definite modifications of

the revenue acts. If all subsequent modifications and revisions of the revenue acts are to be construed as providing a sort of common law for the construction of a particular earlier revenue act, then indeed we have embarked on an uncharted sea. It does considerable violence to common knowledge to assume that what moved Congress in 1928 was the same thought or idea which impelled Congressional action in 1918. In any event this court has disposed of a contention so contrary to fact in *Russell vs. United States*, 278 U. S. 181, 49 S. Ct. Rep. 121, 123, in which it held that:

> "The legislative history of the act of 1924 lends support to the conclusion which we have reached. The changes introduced into the act of 1926 cannot authorize construction of the earlier one not consonant with the language there employed."

See also *U. S. vs. Gillis*, 95 U. S. 407, 24 L. ed. 503.

(e) *The principle that the United States is not to be bound by a statute of limitations unless such intention is clearly manifested is not applicable here.*

A persistent argument of the petitioner seems to be that because the Circuit Court of Appeals stated that the application of the statutes of limitation was a question not devoid of difficulty, it erred in not applying the principle that in cases of uncertainty or ambiguity, statutes of limitations should be construed in favor of the government. (See pages 11, 14 and 29 of brief). For this proposition the petitioner cites, among other cases, *Bowers vs. N. Y. Lighterage Co.*, 273 U. S. 346, 349, 47 S. Ct. 389, 71 L. ed. 676. We submit that this contention of petitioner is entirely erroneous. It is, of course, established law that where there is a general statute of limitations, it will not be construed as having been intended to apply to the United States unless such intention is manifest in its language. Here, however, we have an en-

tirely different situation. The limitation provisions contained in the Revenue Acts of the United States are obviously intended to apply to the United States. Moreover, it is clear that where we are dealing with limitation provisions contained in Revenue Acts that such provisions as part of taxing statutes will be interpreted liberally in favor of the taxpayer. Indeed, the very case cited so often by the Government, (the Bowers case referred to above), holds exactly this when it says:

> "The provision is part of a taxing statute and such laws are to be interpreted liberally in favor of the tax payers."

(f) *The retroactive repeal of Section 1106 (a) of the Revenue Act of 1926 does not affect this action.*

Section 612 of the Revenue Act of 1928 provides:

> "Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926."

It is the contention of the respondents that the repeal of Section 1106 (a) as of the date of its enactment cannot deprive them of rights already vested pursuant to Section 1106 (a). The Circuit Court of Appeals upon motion of the Government for rehearing sustained the contention of the respondents herein on this point (R. 21) and cited the recent decision of this court in *William Danzer & Co. vs. Gulf & Ship Island R. R. Co.* 268 U. S. 633, 69 L. Ed 1126. This court held in that case that if Congress by the Transportation Act of 1920, wherein they excluded from the running of the statute of limitations the period of Federal control, had thereby authorized an action previously barred by the statute of limitations then:

> "To give it (the statute) that effect would be to deprive defendant of its property without due process of law in contravention of the Fifth Amendment."

It is respectfully submitted that the Danzer case is controlling authority that the repeal of Section 1106 (a) deprives the respondents of their property without due process of law if construed to revive a right or liability previously extinguished.

In addition to the decision of the Circuit Court of Appeals for the Seventh Circuit in this case, two Federal Courts have recently held that Section 612 of the Revenue Act of 1928 cannot deprive taxpayers of any rights vested in them under the provisions of Section 1106 (a) of the Revenue Act of 1926.

> *Gile vs. Huntley*, 29 Fed. (2d) 209,
> *Dobbins vs. Commissioner*, C. C. A. 3rd Cir., Mar. 7, 1929, reported Prentice Hall Tax Service for 1929, Par. 603.

In this latter case the Court made the following statement:

> "Section 1106 of the Act of 1926 provides that the bar of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy, but shall extinguish the liability. Therefore, if the United States did have a just claim against Emily M. Dobbins in respect of any tax before the statute ran against it, *the liability was absolutely extinguished in 1926* when the United States was seeking to recover it *and the repeal of the section by the Act of 1928 did not revive a dead liability or create a new obligation.*" (Italics supplied).

The cases cited by the Government relative to the power of Congress to ratify taxes illegally collected are not applicable. The cases cited by the Government are cases where a liability for taxes never theretofore existing, was created under the power of Congress retroactively to enact tax legislation. None of the cases involve a tax or other liability which had been created, subsequently extinguished, and then recreated

by retroactive legislation. No case has been cited where the constitutionality of a statute recreating a liability *under contract* was sustained where the liability under the contract had once been extinguished.

When the taxpayer's liability for taxes was once discharged by virtue of Section 1106 (a), the entire obligation on the bond ceased and the bond became utterly void. How can Congress by reinstating a tax liability against a taxpayer create a new bond liability for such tax retroactively imposed by a new statute? The bond was given to secure a tax imposed by a specific section of the Revenue Act of 1918 and not for any tax for 1918 by whatever act imposed. Any new tax imposed by Section 612 is entirely outside the terms of the bond and hence immaterial to this case.

We do not desire to protract the argument on this phase of the case beyond stating that it certainly would be absurd to contend that a taxpayer's 1918 taxes might be considered paid or extinguished in 1926 by virtue of a particular statute, unpaid and still owing in 1928 by virtue of another, and be alternately extinguished or owing every two years thereafter as Congress passed retroactive legislation.

However, we do not think that this constitutional question is presented to the court for determination. As demonstrated earlier in this brief, Section 1106 (a) is only declaratory of the effect of the limitation provisions of Section 250 (d) of the Revenue Act of 1918. The repeal of Section 1106 (a) did not purport to affect the Revenue Act of 1918 and when the tax liability created by it expired by virtue of its limitation, it remains extinguished regardless of the repeal of Section 1106 (a).

(g) *The petitioner has completely eliminated the word "determination" from Section 250 (d) of the Revenue Acts of 1918 and 1921.*

A clear instance of this is found in the Government's brief at page 17, reading as follows:

> "The statutes relied upon by the respondents place a limitation only upon the time within which the United States may commence a proceeding for the collection of taxes."

Another instance to which we invite the courts' attention is found at the top of page 29 where the petitioner says:

> "We have a contract to pay the amount ultimately to be determined to be due when the determination is made regardless of statutes of limitation on assessments or suits to collect taxes, the benefits of which were waived by the obligors of the bond."

The above statements illustrate the fundamental fallacy of the petitioner in ignoring the comprehensive scope of Section 250 (d).

Section 250 (d) does not only contain the clause,

> "* * * no suit or proceeding for the collection of any such taxes due under * * * prior income * * * tax Acts * * *, shall be begun after the expiration of five years after the date when such return was filed * * *,"

but also provides that:

> "* * * the amount of any such taxes due under any return made under * * * prior income * * * tax Acts * * * shall be determined and assessed within five years after the return was filed."

We thus have a five year limitation against each of the following.

a. The determination of a tax.
b. The assessment of a tax.
c. The commencement of any suit.
d. The commencement of any proceeding.

It seems apparent that Congress intended that all determinations, all assessments, all suits and all proceedings to be effective must be had or initiated within five years after the date of the return.

CONCLUSION.

The entire case of the Government rests on the validity of the determination of the claim in abatement which was admittedly made two years after the five year limitation period had run. We submit that the entire case falls because under the Revenue Acts the determination was void and hence there was no cause of action on the bond.

In view of the foregoing, we respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Sec. 234. (a) (14) (a) of Revenue Act of 1918. Act of Feb. 24, 1919. (40 Stat. L. 1057-96, C. 18.)

"At the time of filing returns for the taxable year 1918 a taxpayer may file a claim in abatement based on the fact that he has sustained a substantial loss (whether or not actually realized by sale or other disposition) resulting from any material reduction (not due to temporary fluctuation) of the value of the inventory for such taxable year, or from the actual payment after the close of such taxable year of rebates in pursuance of contracts entered into during such year upon sales made during such year. In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per centum per month from the time the tax would have been due had no such claim been filed. If it is shown to the satisfaction of the Commissioner that such substantial loss has been sustained, then in computing the taxes imposed by this title and by Title III the amount of such loss shall be deducted from the net income."

Sec. 250 (d) of Revenue Act of 1918. Act of Feb. 24, 1919. (40 Stat. L. 1057-96, C. 18).

"Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by

the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due."

Sec. 250 (d) of Revenue Act of 1921. Act of Nov. 23, 1921 (42 Stat. L. 227, C. 136).

"The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 of succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consents in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: *Provided*, That in the case of income received during the lifetime of a decedent, all taxes due thereon shall be

determined and assessed by the Commissioner within one year after written request therefor by the executor, administrator, or other fiduciary representing the estate of such decedent."

Sec. 277 (a) (2) of Revenue Act of 1924. Act of June 2, 1924. (43 Stat. L. 253, C. 234).

"The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

Sec. 278 (d) of Revenue Act of 1924. Act of June 2, 1924. (43 Stat. L. 253, C. 234).

"Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made."

Sec. 278 (c) of Revenue Act of 1924. Act of June 2, 1924. (43 Stat. L. 253, C. 234).

"This section shall not (1) authorize the assessment of a tax or the colection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

Sec. 274 (a) Revenue Act of 1926, Act of Feb. 26, 1926, 44 Stat. 9C27.

If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a re-determination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Sec. 277 (a) (3) of Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27).

"The amount of income, excess profits, and war-profits

taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

Sec. 278 (d) of Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27).

"Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

Sec. 278 (e) of Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27).

"This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by

the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commisioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act."

Section 283 (c) of the Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27).

"If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner after the enactment of this Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall except as provided in subdivision (b) of this section, be computed as if this Act had not been enacted, *but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations* (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) *as is the case of a deficiency in the tax imposed by this title*, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section."

Sec. 1106 (a) of Revenue Act of 1926. Act of Feb. 26, 1926. (44 Stat. L. 9, C. 27).

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

(10)

SUPREME COURT OF THE UNITED STATES.

No. 526.—October Term, 1928.

The United States, Petitioner, *vs.* The John Barth Company and the United States Fidelity & Guaranty Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 13, 1929.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This was a suit by the United States, through its District Attorney for the Eastern District of Wisconsin, against the John Barth Company, a corporation of Wisconsin, and the United States Fidelity & Guaranty Company, a corporation of Maryland. The subject matter of the suit is the recovery of the amount due on a bond in the sum of $60,000 whereby the respondents bound themselves jointly and severally to pay to the United States the sum therein named under the following circumstances and conditions.

On June 25, 1919, the United States Commissioner of Internal Revenue assessed income and profits taxes against the Barth Company for the year 1918 in the sum of $126,182.81, and of this sum the Company paid $74,764.40. On September 15, 1919, and March 17, 1925, the Company filed claims for the abatement of $39,501.58 of the taxes thus assessed. The Barth Company as principal, and the United States Fidelity & Guaranty Company as surety, in consideration of the United States' refraining from and suspending the collection of taxes thus outstanding against the Barth Company for the year 1918, pending consideration and adjudication of the foregoing claims for abatement, executed and delivered a bond on September 20, 1919, binding them to pay "on notice and demand by the collector . . . any part of such tax found by the Commissioner to be due, with interest at the rate of twelve per cent per annum from the time such tax would have been due, had no such claim been filed."

The Barth Company filed its claim of abatement on the ground that it had sustained a substantial loss resulting from a material reduction of the value of its inventory for the taxable year and from actual payment after the close of the taxable year of rebates in pursuance of contracts entered into during such year upon sales made during the year.

On March 25, 1926, the Commissioner considered the claims, allowed about $10,000, and rejected the rest in the sum of $29,842.32. The Barth Company was notified and payment under the bond of the tax as determined, with interest thereon, requested on February 27, 1926, and on April 5 and 20, 1926, but the Barth Company refused to pay. On August 10 and 27, 1926, the Guaranty Company was notified of the rejection of the abatement claims in the sum above stated, and of the amount and interest due, but that Company also refused payment. The suit was authorized by the Commissioner of Internal Revenue.

To the petition respondents filed a demurrer "for the reason that . . . the action was not commenced within the time limited by law which time is prescribed by Sections 205d [250d] of the Revenue Acts of 1918 and 1921, and Sections 277a-2, 278d and 278e of the Revenue Act of 1924, and Sections 277a-3, 278d, 278e, and 1106a of the Revenue Act of 1926."

The District Court sustained the demurrer, the United States elected to stand on its complaint, and judgment was entered dismissing the complaint.

The United States carried the judgment on writ of error to the Circuit Court of Appeals, which after an unsuccessful effort to certify to this Court certain questions, which were dismissed (276 U. S. 606), heard the writ of error and affirmed the judgment of the District Court. 27 F. (2d) 782. The case is now here on writ of certiorari.

Par. 14 (a), Section 234 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, provides that:

"At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement, based on the fact that he has sustained a substantial loss . . . resulting from any material reduction . . . of the value of the inventory for such taxable year, or from the actual payment, after the close of such taxable year, of rebates in pursuance of contracts entered into during such year upon sales made during such year. In such case, payment of the

amount of tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per cent per month from the time the tax would have been due had no such claim been filed."

In Section 250 (d) the provision is:

"Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made."

Section 250 (d) refers to a failure of the Commissioner of Internal Revenue to pass upon the return made by the taxpayer and to assess the tax. It is the determination preceding the assessment that is referred to in that section. If there is no determination and assessment within five years after the return is made, or after the return should have been made, then the statute bars an assessment and the collection of the tax due. But Section 250 (d) does not apply to the proceeding under par. 14 (a), which relates to a case in which there is a return with a resulting assessment, as there was here, and the taxpayer seeks to reduce the assessed tax by presenting a claim for an abatement of part of it, and to avoid the collection of that part, pending action on the claim for abatement, by giving a bond. In this case there was a return and there was an assessment, but the bond was given well within the five years after the return, and when the bond was given it required the obligees, if the abatement was not allowed, to pay interest from the time such tax would have been due, had no such claim been filed. In other words, the limitation of Section 250 (d) has no application to a situation following a claim of abatement and the giving of bond.

The plain purpose of par. 14 (a) was to effect a substitution for the obligation arising under the return and assessment to pay the tax, of the contract entered into in the bond to pay any part of the tax found to be due upon the subsequent determination of the Commissioner, and this with interest at the rate of 1 per cent per month

from the time the tax would have been due, had no such claim been filed. Of course it is not difficult in the somewhat complicated provisions to suggest, as on behalf of respondent it has been suggested, that some other than the ordinary inference to be given to this set of facts should be drawn, but the common sense view of the return and the delay in the payment due after the claim of abatement and the giving of the bond, is as already stated. The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. The statutes now pleaded to bar the suit can not be extended by implication to a suit upon a subsequent and substituted contract. The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given. If there is any limitation applicable to a suit on the bond, it is conceded that it has not yet become effective.

Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, repeats the limitation of 1918, adding thereto "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax," and like Section 250 (d) of the Act of 1918 has no relevancy or effect here. The Revenue Act of 1924, § 277 (a) (2), c. 234, 43 Stat. 253, repeats a similar limitation of five years. Section 1106 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 113, provides that the bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability. This last Act was repealed as of the date of its enactment. See § 612, c. 852, 45 Stat. 791, 875.

The Government contends that this restores and gives life to the tax retroactively. It is not necessary for us to examine this claim, for the reason that the Act of 1926 does not affect, and was not intended to affect, the obligation arising out of the bond. Such bonds are not referred to in the amendments of 1921 or 1924 or 1926, nor in any way is the taxpayer expressly or impliedly relieved from such contracts. To avoid the result usually ensuing from the return which he himself made, the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his tax liability his contract under the bond. The object of the bond was not only to prevent the immediate collection of the tax but also to

prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought.

It is hardly necessary to refer to authority to justify this conclusion, but it is sustained by *United States* v. *Onken Brothers*, 23 F. (2d) 367; *Gray Motor Co.* v. *United States*, 16 F. (2d) 367; *United States* v. *Rennolds*, 27 F. (2d) 902; *McCaughn* v. *Philadelphia Barge Co.*, 27 F. (2d) 628; *United States* v. *United States Fidelity & Guaranty Co.*, 221 Fed. 27; *Raymond* v. *United States*, Fed. Cas. No. 11596.

The judgment of the Circuit Court of Appeals should be reversed and the cause remanded for further proceedings.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.